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In The

# Supreme Court of the United States

October Term, 1969

No. 1193

HAROLD L. BURKE, PIONEER CASUALTY COMPANY, a Texas corporation, and PIONEER GENERAL AGENCY, INC., a Texas corporation,

*Petitioners,*

vs.

THOMAS C. HUNT, Conservator and Trustee of North Central Fire & Casualty Co., FRANK R. MONTGOMERY, Receiver of North Central Fire & Casualty Co., FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation, and MURPHY FINANCE COMPANY, a Minnesota corporation,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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1970—Northwest Brief Printing Co., 322 S. Fourth St., Minneapolis 55415 338-5078

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*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This is a petition by Harold L. Burke, Pioneer Casualty Company and Pioneer General Agency, Inc., for a writ of certiorari to review judgments of the Supreme Court of the State of Minnesota entered in the above actions on November 19 and 20, 1969.

## I. OPINIONS BELOW

The opinion of the Minnesota Supreme Court, dated October 22, 1969, not yet reported, is reprinted in its entirety in the Appendix to this petition, *infra*, pp. A-1 – A-45, although only portions thereof are directly relevant to the petitioners herein. In addition, the unreported orders and memorandum opinions of the Ramsey County Minnesota District Court involving the petitioners, directly or indirectly, being two orders dated September 4, 1968 and one dated January 14, 1969, are reprinted in the Appendix to this petition, *infra*, pp. A-46 – A-57.

## II. JURISDICTIONAL STATEMENT

The judgments of the Minnesota Supreme Court as to which review is sought were entered on November 19 and 20, 1969, and are reprinted in the Appendix, *infra*, pp. A-58 – A-64. The statutory provision believed to confer jurisdiction on this Court to review such judgments is 28 U.S.C. § 1257(3), in that (1) the judgments in question are final judgments; (2) the Minnesota Supreme Court is the highest court in Minnesota in which a decision can be obtained; and (3) in the cases involved, the validity of the Minnesota long-arm statute, as interpreted, was called into question as repugnant to the due process clause of the fourteenth amendment to the United States Constitution, and the right of these petitioners to due process of law under the fourteenth amendment to the United States Constitution was specially claimed.

## III. QUESTIONS PRESENTED

1. When the jurisdiction of a state court over non-resident corporations and individuals under the state's long-arm statute is challenged by a Rule 12 motion to dismiss supported by unrebutted affidavits contradicting the essential jurisdictional allegations of the plaintiffs' complaint, may a state court consistently with due process accept the allegations of the complaint as true for purposes of deciding the jurisdictional motion?

2. May a state court, consistently with the requirements of due process, ignore the limiting jurisdictional language of the state's own long-arm statute in purporting to extend the extraterritorial limits of its jurisdiction to the maximum extent permitted by the United States Constitution?

3. Is it constitutionally permissible for a state court to exercise personal jurisdiction over non-resident individuals and corporations not physically present within the forum state on the basis of allegations that such non-residents participated in a tortious conspiracy outside the state causing injury within the forum state?

4. Is it consistent with the fundamental fairness guaranteed by the due process clause for a state court to apply its newly-enacted long-arm statute retroactively to reach non-residents not physically present in the forum state on the basis of conspiracy allegations conclusively presumed to be true, while at the same time refusing to exercise any discretion in limiting outstate discovery procedures, the anticipated costs of which alone exceed the reasonable exposure limits of liability of particular non-resident defendants, and likewise refusing to grant a stay or limit discovery proceedings pending application for a writ of certiorari?

## IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The federal constitutional provision involved is the language of the fourteenth amendment which says that "no state shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

The state statutes involved are three statutes relating to the assertion of personal jurisdiction by the Minnesota courts over non-resident individuals, corporations and certain foreign insurance companies, which read in pertinent part as follows:

[1] Minnesota Statutes, Section 543.19 (M.S.A. §543.19):

> Subdivision 1. As to a cause of action arising from any acts enumerated in this subdivision, a court of this state with jurisdiction of the subject matter may exercise personal jurisdiction over any foreign corporation or any non-resident individual, or his personal representative, in the same manner as if it were a domestic corporation or he were a resident of this state. This section applies if, in person or through an agent, the foreign corporation or non-resident individual:
>
> (a) Owns, uses, or possesses any real or personal property situated in this state, or
>
> (b) Transacts any business within the state, or
>
> (c) Commits any tort in Minnesota causing injury or property damage, or
>
> (d) Commits any tort outside of Minnesota causing injury or property damage within Minnesota, if, (1) at the time of the injury, solicitation or service activities were carried on within Minnesota by or on behalf of the defendant, or (2) products, materials, or things processed, serviced or manufactured by the defendant were used or consumed within Minnesota in the ordinary course of trade.
>
> Subd. 2. The service of process on any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by

personally serving the summons upon the defendant outside this state with the same effect as though the summons had been personally served within this state.

Subd. 3. Only causes of action arising from acts enumerated in subdivision 1 may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

[2] Minnesota Statutes, Section 303.13, subd. 1(3) (M.S.A. §303.13):

(3) If a foreign corporation makes a contract with a resident of Minnesota to be performed in whole or in part by either party in Minnesota, or if such foreign corporation commits a tort in whole or in part in Minnesota against a resident of Minnesota, such acts shall be deemed to be doing business in Minnesota by the foreign corporation and shall be deemed equivalent to the appointment by the foreign corporation of the secretary of the state of Minnesota and his successors to be its true and lawful attorney upon whom may be served all lawful process in any actions or proceedings against the foreign corporation arising from or growing out of such contract or tort. Such process shall be served in duplicate upon the secretary of state, together with a fee of $7.50 and the secretary of state shall mail one copy thereof to the corporation at its last known address, and the corporation shall have 20 days within which to answer from the date of such mailing, notwithstanding any other provision of the law. The making of the contract or the committing of the tort shall be deemed to be the agreement of the foreign corporation that any process against it which is so served upon the secretary of state shall be of the same legal force and effect as if served personally within the state of Minnesota.

[3] Minnesota Statutes, Section 60A.21, subd. (2) (M.S.A. §60A.21):

(1) Any of the following acts in this state effected by mail or otherwise by an unauthorized foreign or alien insurer: (a) the issuance or delivery of con-

> tracts of insurance to residents of this state or to corporations authorized to do business therein; (b) the solicitation of applications for such contracts; (c) the collection of premiums, membership fees, assessments, or other considerations for such contracts; or (d) any other transaction of insurance business, is equivalent to and shall constitute an appointment by such insurer of the commissioner of insurance and his successor or successors in office to be its true and lawful attorney upon whom may be served all lawful process in any action, suit, or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contract of insurance and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this state upon such insurer.

In addition, the definition of "foreign corporations" in Minnesota Statutes, Section 303.02 (M.S.A. § 303.02) to exclude "insurance companies" as defined in Minnesota Statutes, Section 60A.02 (M.S.A. § 60A.02) is relevant to a consideration of this petition.

## V. STATEMENT OF THE CASE

This petition arises from an action commenced in March of 1968 by the Minnesota conservator [Thomas C. Hunt, the Minnesota Commissioner of Insurance], later joined by the West Virginia receiver [Frank R. Montgomery, the West Virginia Commissioner of Insurance], of North Central Fire and Casualty Co. ("North Central"), a West Virginia insurance corporation which conducted much of its business activity in Minnesota. The plaintiffs filed a complaint (Hunt App. A-1 – A-19)[1] in Ramsey County District Court

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[1] References to the "Hunt Br." and the "Hunt App." refer to the brief and the appendix to the brief filed by the plaintiffs as the appellants in Appeal Nos. 41697-8 in the Minnesota Supreme Court. References to the "Pet. Br." and the "Pet. App." refer to the joint brief and the appendix thereto filed by the petitioners herein as respondents in Appeal Nos. 41697-8 and 41701 in the Minnesota Supreme Court.

naming twenty-two defendants, ten corporations and twelve individuals, only three of whom were citizens or residents of Minnesota.[2] The complaint asserted seven claims for relief, but in substance it alleged that all the defendants participated in a conspiracy to strip North Central of $750,000 of its assets through a series of transactions, the principal of which occurred in a meeting on March 24, 1966 on the premises of the defendant First National Bank of St. Paul ("First National") in St. Paul, Minnesota. The transactions were essentially alleged to have involved the wrongful pledge of the assets of North Central to two Nevada banks[3] as security for a loan the proceeds of which were used simultaneously by the borrowers, a group of individual non-resident defendants[4], through dummy corporations[5], to acquire the stock of North Central, together with the stock of Pioneer General Agency, Inc., a Texas corporation ("Pioneer General" or one of the "Pioneer Companies"), a petitioner herein. The proceeds received by the seller of the North Central stock, Cyril C. Sheehan, were alleged to have been used principally to repay his personal obligations to two Minnesota financial institutions, First National and Murphy Finance Company ("Murphy").

At approximately the same time as the foregoing action was commenced, the same plaintiffs instituted an action on behalf of North Central against its fidelity insurer, Fidelity & Deposit Company of Maryland (the "Bonding Company"),

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[2]The First National Bank of St. Paul, Murphy Finance Company and Cyril C. Sheehan.

[3]The Bank of Nevada and the Nevada State Bank.

[4]Don F. Roberts, Julian M. Riley and Edward M. Yearbury, citizens and residents of Missouri.

[5]Financial Funding Corporation of Nevada, Inc., Block Management Services, Inc., a Missouri corporation, and Federal Investment corporation, a Missouri corporation.

on an employee fidelity bond, seeking to recover the amount of the bond, $100,000, on the basis of generally the same allegations made in the principal action. The Bonding Company promptly filed and served third-party complaints against the defendants named in the principal action, seeking indemnity and/or subrogation against them in the event it should be held liable on its bond.

The petitioners herein, Harold L. Burke ("Burke"), a citizen and resident of Texas, Pioneer Casualty Company ("Pioneer Casualty" or one of the "Pioneer Companies"), a Texas corporation, and Pioneer General, are three of the nonresidents named as defendants in the principal action and third-party defendants in the Bonding Company's action. Service of process was made upon Burke in both actions pursuant to M.S.A. § 543.19, *supra*, p. 4, by personal service upon him at his home in Texas. The Pioneer Companies were served in the principal action by substituted service upon the Minnesota Secretary of State, as provided in M.S.A. § 303.13, *supra*, p. 5; Pioneer Casualty was additionally served by substituted service upon the Minnesota Commissioner of Insurance (in essence, the plaintiff Hunt served himself) pursuant to M.S.A. § 60A.21, *supra*, p. 6. In the Bonding Company's third-party action, the Pioneer Companies were served under M.S.A. § 543.19 by personal service upon Burke, an officer of both companies, in Texas.

### A. Petitioners' Jurisdictional Motions

The petitioners thereafter timely filed motions in both actions under Rule 12 of the Minnesota Rules of Civil Procedure (identical in all material respects to Federal Rule 12) for dismissal of the complaints and third-party complaints for lack of jurisdiction over their persons[6], (Hunt App. A-35 – A-37; Pet. App. A-6 – A-7; A-10 – A-11) as did the other non-resident defendants who had been served. In addition, insofar as service under M.S.A. § 543.19 was concerned, the petitioners sought dismissal on the basis that the statute could not be applied retroactively to acts occurring prior to its effective date, May 16, 1967.[7]

### B. Petitioners' Supporting Affidavits

In support of their jurisdictional motions, the petitioners filed affidavits of Burke directed to the non-conclusory jurisdictional allegations of the pleadings against them (Pet. App. A-1 – A-5; A-8 – A-10; A-12 – A-14). Aside from the conclusory assertion of the petitioners' guilty knowledge of the activities of the other defendants and of the conclusory assertion of their participation in a conspiracy, the only direct allegations in the plaintiffs' complaint in the principal action concerning the petitioners were that on the crucial day, March 24, 1966, Burke was physically present in St. Paul "representing himself, Pioneer Casualty

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[6]As part of their Rule 12 motions, in addition to asserting the jurisdictional defenses, the petitioners sought dismissal on the ground that the complaint failed to state a claim against them upon which relief could be granted. The district court did not reach this question in its disposition of the motions.

[7]In doing so, the petitioners relied upon a Minnesota statute, M.S.A. §645.21, and a line of cases construing it, notably *Eckstrom v. Harmon*, 256 Minn. 166, 98 N.W.2d 241 (1959), and *Chapman v. Davis*, 233 Minn. 62, 45 N.W. 2d 822 (1951), to the effect that neither statutes affecting "substantive" rights nor "procedural" rights or remedies will be applied retroactively in Minnesota unless the legislature manifestly intends otherwise.

Company and Pioneer General Agency, Inc." (Hunt App. A-13), and that Burke thereupon received $24,000 in a distribution of the proceeds of the loan allegedly obtained from the Nevada banks on the security of North Central's assets[8] (Hunt App. A-15). In the petitioners' supporting affidavits, Burke denied that he had been present in St. Paul as alleged, denied that he had attended or participated in the allegedly infamous loan closing, and therefore denied that he could have represented the Pioneer Companies as alleged. He stated that he had previously signed an agreement in Texas for the sale of his minority interest in Pioneer General; that it had been forwarded to Minnesota; and that thereafter the proceeds from the sale of his stock were mailed to him in Texas (Pet. App. A-1 – A-2). On behalf of the Pioneer Companies, Burke's affidavits stated that they had never done business in Minnesota, in insurance or otherwise, and that their only contacts with Minnesota had involved reinsurance and agency agreements with North Central entered in 1965 which were performed in Texas and had nothing to do with the subject matter of the plaintiffs' complaint[9] (Pet. App. A-3 – A-5).

### C. The Plaintiffs' Jurisdictional Support

In oblique response to the petitioners' sworn denial of any jurisdictional presence as alleged in the complaint, the plaintiffs submitted an affidavit on information and belief, supported by a series of documents attached as exhibits (summarized in Pet. Br. pp. 10-11). The documents, essen-

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[8]The complaint did allege that Burke "formerly held a minority stock interest" in North Central (Hunt App. A-4). Burke denied ever owning North Central stock in one of his affidavits, however, and the plaintiffs made no attempt to dispute his statement.

[9]As a result of these agreements, however, the Pioneer Companies are the largest claimants in the North Central receivership and conservatorship proceedings.

tially copies of correspondence and agreements relating to Burke's sale of his interest in Pioneer General, together with copies of completely unrelated contracts between the Pioneer Companies, North Central and Murphy, not only supported Burke's denials of physical presence in Minnesota[10], but exposed the plaintiffs' claim to jurisdiction of the Minnesota courts over the Pioneer Companies as exclusively dependent upon isolated "contacts" with the state unrelated to the subject matter of the plaintiffs' action. In addition to their affidavit, during the second day or argument on the motions to dismiss, counsel for the plaintiffs attempted to serve the petitioners' counsel, in the courtroom, with a one paragraph "Amendment" to the complaint containing a series of conclusory allegations relating to the Pioneer Companies' participation in the conspiracy charged, but completely barren of allegations of jurisdictionally significant activities in Minnesota (Hunt Br., p. 31).

The Bonding Company relied strictly upon whatever jurisdictional support the plaintiffs in the principal action could muster.

### D. The District Court: Argument and Dismissal

The district court heard lengthy arguments and considered extensive briefs from all parties on the questions raised by the various motions to dismiss. In addition to the question of the retroactive application of the Minnesota long-arm statute, M.S.A. § 543.19, the petitioners briefed and

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[10]The plaintiffs' affidavit lamely states that because Burke's name appears on some of the documents, he was necessarily "on or near" the premises of First National on March 24, 1966, or, alternatively, that he was present "through persons acting in his behalf." (Hunt Aff. I, pp. 4, 6.) Subsequently, the plaintiffs argued that Burke was represented by an "agent" in St. Paul, but declined to indicate who the agent might have been (Hunt Br. 11). The Minnesota Supreme Court, in some measure at least, was impressed by the "mysterious agent" theory (App. A-37).

argued the propositions that the jurisdiction of the Minnesota court over the petitioners had not been established within the language or meaning of the statutes under which the petitioners had been served, and that if the statutes had been appropriately invoked, their application to the petitioners would constitute a denial of due process under the fourteenth amendment to the Constitution of the United States (e.g., "Memorandum of Law in Support of Motion of Defendant, Harold L. Burke, to Dismiss Complaint," pp. 3-8).

In granting the petitioners' motions to dismiss in both actions, the district court neither made any findings of fact relating to Burke's physical presence in Minnesota nor reached the constitutional questions raised. Dismissal as to Burke was granted on the ground that M.S.A. § 543.19 could not be applied retroactively under Minnesota law to claims arising prior to its enactment (App. A-48). In the Bonding Company's third-party action, the Pioneer Companies were dismissed for the same reason (App. A-54). In the principal action, the Pioneer Companies' dismissal was placed upon the ground that the complaint and supporting materials did not sufficiently allege the making of a contract to be performed in Minnesota or the commission of a tort in Minnesota within the meaning of M.S.A. § 303.13 to subject the Pioneer Companies to the personal jurisdiction of the Minnesota courts (App. A-51). Both the plaintiffs and the Bonding Company appealed the district court's dismissal of Burke and the Pioneer Companies.

### E. Murphy Finance Company Impleader

After the petitioners had been dismissed by the district court and the dismissals had been appealed, one of the resident defendants, Murphy, which had previously filed, and then withdrawn, impleader motions in which the petitioners were *not* included as proposed third and fourth-party defendants, attempted a bit of jurisdictional "bootstrapping" by filing motions in both actions seeking leave to serve the petitioners and others with third- and fourth-party complaints. The district court denied Murphy's motions as to the petitioners as a matter of discretion because of Murphy's tardiness (App. A-56), and Murphy appealed and/or sought discretionary review by the Minnesota Supreme Court.

### F. The Minnesota Supreme Court's Reversal

Eventually, all of the appeals, some twelve in number, relating to both the plaintiffs' and the Bonding Company's actions were consolidated for argument in the Minnesota Supreme Court. As respondents in appeals involving them, the petitioners again briefed and argued questions relating to the retroactive application of M.S.A. § 543.19, the failure to assert claims against them of the type covered by the jurisdictional statutes under which they were served, and the unconstitutionality of such statutes as violative of due process as applied to the petitioners (Pet. Br. 23-34).

The Minnesota Supreme Court reversed the district court's orders dismissing the petitioners from both the principal action and the Bonding Company's action, and also reversed the district court's discretionary order denying

Murphy leave to implead the petitioners as third- and fourth-party defendants[11], although reaffirming the belated nature of Murphy's claim (App. 44). The court not only ruled adversely to the petitioners on the questions of due process raised, but also, in so doing, compounded the felony by accentuating related issues of due process previously latent.

Initially, the court brushed aside a line of its prior decisions concerning the retroactive application of statutes and borrowed the substance-procedure distinction occasionally drawn elsewhere but theretofore rejected in Minnesota. It held that M.S.A. § 543.19 could be applied retroactively to acts occurring prior to its effective date because it affected only the "procedural" and not any "substantive" rights of non-resident litigants.[12]

Next, in an apparent effort to avoid making findings of fact with respect to the physical presence of the petitioners in Minnesota through Burke[13], the court made at least two errors which the petitioners claim reach constitutional pro-

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[11] Because the court's decision on Murphy's motions for leave to implead in effect resolves against them in advance the petitioner's objections to personal jurisdiction over them in connection with Murphy's claims, the petitioners herein seek review of the constitutional questions presented by Murphy's extraterritorial impleader in conjunction with the same questions presented in the principal action and the Bonding Company's action. For purposes of this petition, the due process arguments against all respondents are essentially the same.

[12] With respect to the claim of the non-resident defendants that M.S.A. §645.21 enjoins retroactive application of all statutes, whether substantive or procedural, unless "clearly and manifestly so intended by the legislature," the court convinced itself that by the mere exercise of enacting M.S.A. §543.19 the Minnesota legislature had manifested its clear intention that the statute be applied so as to "extend the extraterritorial jurisdiction of our courts to the maximum limits consistent with constitutional limitations." (App. A-20.)

[13] At one point, the court states that "it is unclear whether all of the individual defendants were at that meeting," referring to the St. Paul meeting of March 24, 1966. Discovery taken by the plaintiffs subsequent to the decision of the Minnesota Supreme Court has removed all doubt concerning Burke's alleged attendance at the St. Paul caucus. He was not present.

portions in the context of these actions. First, it stated that in reviewing Rule 12 motions to dismiss *for lack of personal jurisdiction*, "allegations in the complaint must be taken as true" (App. A-6), thereby foreclosing any non-resident from challenging jurisdictional allegations by competent proof at any stage of the proceedings prior to trial on the merits. Second, it held that where participation in a tortious conspiracy is charged, physical presence in Minnesota is unnecessary to the assumption of personal jurisdiction over non-residents alleged to be co-conspirators, thereby rendering it impossible for a non-resident to challenge the jurisdiction of the Minnesota courts in any case in which a cause of action for conspiracy is stated against him. The court stated: "Once participation in a tortious conspiracy—the effect of which is felt in this state—is sufficiently established, actual physical presence of each of the alleged conspirators is not essential to a valid assertion of jurisdiction." (App. A-34).

At the same time, the court refused to address itself to the petitioners' claim that as a matter of fundamental fairness the allegations of a complaint, together with its supporting materials, if any, must be fitted, within some reasonable limitation at least, to the language of the statute purporting to create personal jurisdiction over non-residents. Ignoring the language of M.S.A. § 543.19 and M.S.A. § 303.13 completely, the court held by necessary implication that because "the legislature intended the statute to reach as far as constitutional limits would permit" (App. A-34), federal due process, and not the language of the Minnesota statutes, is the only consideration limiting the exercise of personal jurisdiction by the Minnesota courts.

With the groundwork thus tortuously laid, the Minnesota Supreme Court rather easily concluded that the fourteenth amendment did not prohibit the assertion of jurisdic-

tion over the petitioners in these actions. The petitioners had, after all, said the court, been charged with participating in a conspiracy alleged to have caused injury to an insurance company whose principal place of business, and the majority of whose policyholders, were located in Minnesota. While not referring specifically to these petitioners, the court expressed its satisfaction with the constitutional sufficiency of the plaintiffs' allegations of such conduct, even in the absence of any jurisdictional presence, by posing a series of rhetorical questions, including the following:

> With respect to any of the defendants, to suggest that it is unfair to require them to respond to an action in this jurisdiction would seem to say that they may rely on our contract law to uphold the terms of lawful agreements but that they may not be required to defend an action based on injury to our citizens *as a result of an unlawful agreement.* * * *
>
> How, then should it be offensive to assert jurisdiction of an action against the persons who intentionally set in motion financial actions of the kind alleged in this case, the inescapable effect of which is to injure Minnesotans? (Emphasis added.) (App. A-36 – A-37.)

### G. Post-Judgment Proceedings

Following the entry of judgment in all appeals, and the commencement of local discovery proceedings in Minnesota, the plaintiffs in the principal action noticed the taking of seventeen depositions in Las Vegas, Nevada over a nine-day period, for both discovery purposes and use at the trial (App. A-64 – A-66)[14]. The petitioners filed a motion in the district court for a protective order, requesting that the court either require the plaintiffs to exhaust written discovery proceedings prior to an expensive, extended junket

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[14]The post-judgment motions and other proceedings are reprinted in the appendix to this petition for the convenience of the court.

to Nevada, limit outstate discovery in some manner, or pay the petitioners' expenses therefore (App. A-67 – A-68). The district court denied all relief in a summary order (App. A-69), and the petitioners filed a petition for a writ of mandamus in the Minnesota Supreme Court asking the court to direct the district court to exercise *some* discretion in the matter of outstate discovery procedures (App. A-75 – A-78). The Minnesota Supreme Court orally declined to issue the writ. In addition to the foregoing, the petitioners applied in both the district court and the Minnesota Supreme Court for a stay of all proceedings pending the disposition of this petition for certiorari (App. A-70 – A-75). Again, both courts denied all relief, the district court by a summary order (App. A-78), and the Supreme Court by an oral indication from its Chief Justice that the court lacked jurisdiction to grant a stay inasmuch as its "mandate" had issued to the district court.

### H. Federal Questions Raised

The due process of law questions raised in the state courts by the petitioners, the stage of the lower court proceedings at which, and the manner in which, such federal questions were raised, have already been indicated. In summary, in their motions to dismiss and in their briefs and argument in the Ramsey County District Court, the petitioners challenged the application to them of the Minnesota long-arm statutes under which they were served as constituting a denial of due process under the fourteenth amendment. The district court granted the petitioners' motions without reaching the constitutional issues. The petitioners renewed their claim of the unconstitutionality of the long-arm statutes as applied to them in their briefs and argument in the Minnesota Supreme Court. The latter court expressly ruled

that service upon the petitioners under the statutes in question was constitutionally permissible.

## VI. ARGUMENT: REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

### A. The Minnesota Supreme Court's announced rule of accepting the allegations of a complaint as true for purposes of deciding a Rule 12 motion to dismiss for lack of personal jurisdiction filed by a non-resident defendant and supported by affidavits contradicting the essential jurisdictional allegations made, denies non-residents due process by preventing them from challenging the court's jurisdiction at any time prior to a trial on the merits. The Minnesota court's decision on this point is in conflict with decisions of this Court and other federal courts requiring an opportunity for a non-resident defendant to challenge jurisdiction over him by some appropriate preliminary proceeding, and review should be granted for that reason.

In the context of these actions, which can appropriately be termed "dragnet" operations involving a myriad of non-resident corporations and individuals, the Minnesota Supreme Court's acceptance of the allegations made in the plaintiffs' complaint as conclusive against jurisdictional motions supported by affidavits is particularly unfair. If non-residents are not entitled to challenge allegations of personal jurisdiction in some manner, and to obtain a meaningful hearing thereon at some preliminary stage of the proceedings in the forum state, an opportunity long afforded them in the federal courts, then non-resident defendants who may or may not be subject to the forum court's jurisdiction are faced with a Hobson's choice of either defending the action on the merits in the forum state, at possibly prohibitive expense, as here, or of risking the attempted enforcement of default judgments against them. In these ac-

tions, even by the plaintiffs' own reckoning, Burke is alleged to have received but $24,000, the Pioneer Companies nothing; yet they are not only exposed to the plaintiffs' demand for judgment of $750,000, but are being forced to expend thousands of dollars in unlimited, nationwide discovery and stand on the threshold of a three-month trial which gives unmistakable promise of becoming a three-ring circus. Even the ultimate vindication of the petitioners on the merits would be a hollow victory indeed if the proper deference to their jurisdictional motions and supporting affidavits dictated by procedural fairness would have avoided the entire costly procession.

In stating that the allegations of the plaintiffs' complaint must be accepted as true for purposes of reviewing a Rule 12 motion, the Minnesota Supreme Court obviously confused the standard of review applicable to motions to dismiss under Federal Rule 12(b)(6) [Minnesota Rule 12.02(5)] for *failure to state a claim upon which relief can be granted* (to which motions the court's statement would properly apply), with the standard required in connection with motions to dismiss under Rule 12(b)(1)-(5) [Minnesota Rule 12.02(1)-(4)] for various reasons including lack of personal jurisdiction. This Court long ago stated in *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), that "If [a plaintiff's] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof." Thus, under procedures followed in the federal courts, "where the motion raises one of the objections listed as (1) to (5) of Rule 12(b) there has never been any doubt but that affidavits are proper, and indeed in such cases the court can weigh the affidavits and resolve the fact issues on the basis of them, in accord with the historic practice of the courts in dealing with jurisdictional objections." 1A Barron &

Holtzoff, Federal Practice and Procedure, § 346, p. 293 (1960). See, *e.g., Taylor v. Portland Paramount Corp.*, 383 F.2d 635, 639 (9th Cir. 1967) ("We do not think that the mere allegations of the complaint, when contradicted by affidavits, are enough to confer personal jurisdiction of a non-resident defendant. In such a case, facts, not mere allegations, must be the touchstone."); *Williams v. Minnesota Mining and Mfg. Co.*, 14 F.R.D. 1 (S.D. Calif. 1953); *Hollywood Associates, Inc. v. Morris*, 13 F.R.D. 141 (S.D. N.Y. 1952).

The petitioners submit that the opportunity to contest jurisdictional allegations as a preliminary matter in cases as far-reaching as those involved in this petition is a matter of fundamental fairness which this Court should compel the Minnesota courts to afford to non-residents under the due process clause of the fourteenth amendment. The Minnesota Supreme Court's initial acceptance of the plaintiffs' allegations as true and its failure to even mention or consider the petitioners' supporting affidavits as they relate to the petitioners' contacts with the forum state undoubtedly set the tone for the court's rationalization, on other equally objectionable grounds, of its decision to subject the petitioners to the jurisdiction of the Minnesota courts.

**B. The language of the Minnesota long-arm statutes under which non-residents are served, where more restrictive than the permissible limits of due process announced by this Court, governs the assertion of personal jurisdiction over such non-residents; the Court should review these cases to clarify the distinction between the requirements of a particular long-arm statute per se and what is otherwise constitutionally permissible under long-arm statutes in general.**

Despite all efforts by the petitioners to get the Minnesota Supreme Court to identify the language in the Minnesota long-arm statutes involved, particularly M.S.A. § 543.19, which justifies or permits the exercise of personal jurisdiction over them, the court said not one word on the subject. Instead, the court held that the mere fact of its enactment by the Minnesota legislature in 1967 was a clear indication that M.S.A. § 543.19, *presumably whatever its language*, was intended to apply to the maximum limit permitted by the fourteenth amendment, both on the question of retroactivity (App. A-20) and the question of the scope of its application (App. A-34). This decision, while simplifying the court's judicial tasks by eliminating the necessity of statutory construction and substituting reference to this Court's decisions concerning the sufficiency of a non-resident's "contacts" with the forum state, is not only illogical but basically unfair to anyone who seeks to ascertain the meaning of a statute through the orthodox method of reading it[15].

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[15]The court redoubled its efforts at statutory non-construction in connection with service upon Pioneer Casualty under M.S.A. §303.13 and M.S.A. §60A.21. In response to Pioneer Casualty's arguments (1) that M.S.A. §303.13 was inapplicable because Pioneer Casualty was an insurance company and that "foreign corporations" subject to service under M.S.A. §303.13 were specifically defined in M.S.A. §303.03 to exclude "insurance companies"; and (2) that M.S.A. §60A.21 was inapplicable because Pioneer Casualty had not engaged in *any* insurance business in Minnesota, much less "unauthorized" insurance business, the court said: "Section 303.13 by its reference to the Insurance Code shows that the former was not intended to cover what §60A.21 covers; and it can be inferred that if §60A.21 doesn't

For example, consider the only language of M.S.A. § 543.19 which has any conceivable bearing upon the petitioners in these cases, that is, the language which says that a non-resident may be sued in Minnesota if he:

> (c) Commits any tort in Minnesota causing injury or property damage, or[16]
>
> (d) Commits any tort outside of Minnesota causing injury or property damage within Minnesota, if (1) at the time of the injury, solicitation or service activities were carried on within Minnesota by or on behalf of the defendant, or (2) products, materials, or things processed, serviced or manufactured by the defendant were used or consumed within Minnesota in the ordinary course of trade.

The Minnesota Supreme Court itself stated that the petitioners are alleged to have conspired outside the state, resulting in injury within the state—thereby eliminating subparagraph (c) from consideration by its very terms. Subparagraph (d) is certainly no more applicable; it has never been contended by anyone that "at the time of the injury, solicitation or service activities were carried on within Minnesota" by the petitioners, or that "products, materials, or other things processed, serviced or manufactured" by the petitioners "were used or consumed within Minnesota in the ordinary course of trade." See *Scilon, Inc. v. Brema, S.p.A.*, 271 F.Supp. 516, 520-21 (N.D. Ohio 1967). In short, nothing in M.S.A. § 543.19 even purports to apply to the *type* of claim which the plaintiffs have asserted, or to the type of wrong which the petitioners are alleged to have committed.

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apply (and it would not when the insurance company has contacts not related to insurance), then §303.13 does." (App. A-28.) In other words, said the court, if a non-resident insurance company is served under both statutes, then it matters not that neither applies to the non-resident by its terms, since statutory authorization *must* be in there somewhere.

[16]Contrast this language with that of M.S.A. §303.13, which refers to the commission of a tort "in whole or in part" in Minnesota.

How can it be true, as the Minnesota court has in effect held, that because the due process clause might *permit* the assertion of jurisdiction over a non-resident in a particular case, that, ergo, M.S.A. § 543.19 automatically *reads* accordingly? Other courts, even a federal court applying a Minnesota long-arm statute[17], have not shared the confusion of the Minnesota Supreme Court in these actions. *E.g., Beaty v. M. S. Steel Co.*, 401 F.2d 157 (4th Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969); *Bowman v. Curt G. Joa, Inc.*, 361 F.2d 706 (4th Cir. 1966); *Fontanetta v. American Board of Internal Medicine*, 303 F.Supp. 427 (E.D. N.Y. 1969). And see, *e.g., Lawson v. Baltimore Paint and Chemical Corp.*, 298 F.Supp. 373 (D. Md. 1969); *McPhee v. Simonds Saw & Steel Co.*, 294 F.Supp. 779 (N.D. Wis. 1969). In *Beaty v. M. S. Steel Co., supra*, the Fourth Circuit, criticizing a district court opinion in *St. Clair v. Righter*, 250 F. Supp. 158 (W.D. Va. 1966), stated:

> [T]he court rendered nugatory the long-arm statute, and, ignoring limitations embodied in the statute, asserted jurisdiction to the full extent of the due process clause of the Fourteenth Amendment. In so doing, the District Court misconceived the role of the due process clause and misinterpreted the decisions of the Supreme Court dealing with the state's power to exercise jurisdiction of non-residents. * * *
>
> [I]t is clear that at least where the legislature has acted, even though the statute may not go to the limits of due process, the courts of a state may not go further and assert jurisdiction over persons not embraced within that legislation. Whether the Maryland legislature could, consonant with due process, have gone further than it did and subjected this defendant to jurisdiction is not the issue before us. We hold only that a trial

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[17] *Flemmen v. Midland Overseas Shipping Corp.*, 254 F. Supp. 592 (D. Minn. 1966) (service quashed because tort not committed against "resident" of Minnesota within the meaning of M.S.A. §303.13).

court may not exercise more jurisdiction than the statute permits. 401 F.2d at 161.

On the other hand, the Minnesota court's tortured reasoning is not altogether unshared. See, *e.g.*, *Sanders Associates, Inc. v. Galion Iron Works & Mfg. Co.*, 304 F.2d 915 (1st Cir. 1962); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961). "In effect, what these courts have done is to abdicate their duty to construe the statutes of their own states and to turn it over to the Supreme Court of the United States . . . ." *Taylor v. Portland Paramount Corp.*, *supra*, 383 F.2d at 640. The petitioners contend that this Court should review the judgments herein to reestablish the distinction between what the federal constitution permits and what a particular state long-arm statute says, and to restore to state courts their normal function of statutory construction.

**C. The Minnesota Supreme Court's decision that it is constitutionally permissible to exercise personal jurisdiction over non-resident corporations and individuals not physically present in the forum state on the basis of allegations that such non-residents participated in a tortious conspiracy outside the state causing injury within the state goes beyond the decisions of this Court and decides a federal question of substance not heretofore determined by this Court.**

Nothing in this Court's prior decisions in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); or *Hanson v. Denckla*, 357 U.S. 235 (1958), indicates that the requisite minimum contacts to personal jurisdiction over non-residents can be provided by the occurrence of an injury within the forum state alleged to have resulted, without more, from a non-resident's "participation" in an unlawful agreement outside the state. This Court has never been called upon to

decide whether the tort known as "civil conspiracy" is even appropriate subject matter for the extraterritorial reach of a state court's jurisdiction. The will-o-the-wisp nature of a charge of conspiracy should cause some hesitation in sanctioning its unrestricted use in long-arm situations, particularly as a vehicle for acquiring jurisdiction in cases of otherwise marginal "contacts."

In the absence of the physical presence of either the non-resident or an instrumentality provided by him, or in the absence of some purposeful availing by the non-resident of the forum state's laws or processes, the minimum contacts required by the fourteenth amendment are simply not present, and the mere allegation that the non-resident participated in a conspiracy cannot supply the deficiency. At the very least, due process requires that the non-resident charged as a conspirator have performed some act in furtherance of the alleged conspiracy within the forum state in order to subject him to its jurisdiction. *Magnaflux Corp. v. Foerster*, 223 F.Supp. 552, 565 (N.D. Ill. 1963); *Gypsy Pipeline Co. v. Ivanhoe Petroleum Corp.*, 256 F.Supp. 567, 569 (D. Colo. 1966).

As the instant cases clearly reveal, this Court's caveat in *Hanson v. Denckla*, 357 U.S. at 251, that "it is a mistake to assume that this trend [toward expanding extraterritorial jurisdiction] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts," continues to go unheeded. The petitioners submit that the time has come for this Court to sound a second warning by granting a review of these actions.

**D. This Court should grant review of these cases because the totality of the circumstances herein reveals a repeated and continuing fundamental procedural unfairness by the Minnesota courts to these non-resident defendants; in addition to applying a newly enacted long-arm statute retroactively to reach non-residents not physically present in the forum state, on the basis of allegations of conspiracy assumed to be true, the Minnesota courts have refused to exercise any discretion in protecting the litigants from tremendous outstate discovery expenses, expenses themselves likely to exceed any recovery to be anticipated against the petitioners, and have refused to stay the proceedings pending this application for a review of the undeniably doubtful jurisdictional questions decided.**

The petitioners have included reference to matters which have occurred subsequent to the entry of judgments by the Minnesota Supreme Court on November 19 and 20, 1969, in order to dramatize the perfunctory manner in which, after reaching out on the basis of conclusory allegations to assert jurisdiction over non-residents, and retroactively at that, the Minnesota courts have disposed of every request by the petitioners to claim the protection of established procedural rules.

Having once been corraled by the Minnesota courts, the petitioners and other non-residents have suddenly been herded into the open range known as Las Vegas for nine days of grazing. Not even an offer by the Nevada defendants to bring representatives conversant with the subject matter of these actions to Minnesota to be deposed, in order to possibly reduce the number of oral depositions required in Nevada, appealed to the plaintiffs' sense of restraint or the Minnesota courts' discretion. What lies in store hereafter would appear to depend solely upon the heretofore boundless energies of the plaintiffs' counsel and the resources of the North Central conservatorship. To this date, the Minnesota

courts have refused to take any action to afford non-resident defendants the slightest protection from unnecessary, time-consuming and costly pre-trial discovery procedures outside the State of Minnesota; nor have they consented to stay the proceedings pending the disposition of this petition.

The petitioners contend that these circumstances accentuate the dangers inherent in jurisdictional overreaching by state courts and provide further cause for the review of the judgments herein by this Court.

## VII. CONCLUSION

Wherefore, the petitioners pray that a writ of certiorari be issued to review the judgments of the Minnesota Supreme Court in these actions.

Respectfully submitted,

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# APPENDIX

No. 202 Ramsey County Peterson, J.

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Thomas C. Hunt, Conservator and Trustee of North Central Fire & Casualty Co., et al.,

Appellants,

41697-8-9-700-1-2-3 vs.

Nevada State Bank, et al.,

Appellants,

Harold L. Burke, et al.,

Respondents.

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Thomas C. Hunt, Conservator and Trustee of North Central Fire & Casualty Co.,

Respondent,

41855-6-7 vs.

Nevada State Bank, et al.,

Defendants,

Don F. Roberts, et al.,

Appellants,

First National Bank of St. Paul,

Respondent.

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Thomas C. Hunt, Conservator and Trustee of North Central Fire & Casualty Co.,

Plaintiff,

41884-5 vs.

Nevada State Bank, et al.,

Defendants,

Murphy Finance Co.,

Appellant,

Pioneer Casualty Co., et al.,

Respondents,

Delta Insurance Company, Ltd.,

Respondent.

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(Endorsed: Filed October 22, 1969. John McCarthy, Clerk, Minnesota Supreme Court.)

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## SYLLABUS

1. In reviewing orders granting or denying pretrial motions to dismiss actions pursuant to Rule 12.02, Rules of Civil Procedure, the allegations of the complaint, together with the collateral evidence supporting them, are assumed to be true.

2. Orders granting or denying pretrial motions to dismiss for lack of jurisdiction are appealable of right. An order granting such motion is an order which determines the action. Rules of Civil Appellate Procedure, Rule 103.03(f). An order denying such motion is not merely a retention of the action for trial, but is a determination of a fundamental right, compelling the defendant to take up the burden of litigation.

3. Denial of leave to serve third- and fourth-party complaints is not appealable of right, but the court will reach the merits of the appeal under the provision allowing for discretionary review, Rule 105.01, Rules of Civil Appellate Procedure, when decision on issues presented in appeals of right cannot be made without consideration of issues presented in otherwise nonappealable matters.

4. An order denying a motion to dismiss for nonjoinder of an indispensable party plaintiff, in a case subjecting defendant to a substantial risk of multiple liability in favor of a nonresident plaintiff, raises constitutional issues of due process and is appealable of right.

5. Minn. St. 543.19, as a nonconsensual long-arm statute under which extraterritorial jurisdiction is asserted over nonresident individuals and foreign corporations, is construed to be applicable to actions arising prior to its enactment. The legislature's basic interest is interpreted to be that extraterritorial jurisdiction should be asserted to its

maximum reach consistent with the constitutional limitations of due process. When statutes are modeled after, or are uniform with, statutes of other states, moreover, weight will be accorded the other states' interpretations and constructions of those statutes. Minn. St. 645.22. The Illinois statute upon which § 543.19 is modeled was applied retroactively in that state and this decision has been followed by the majority of jurisdictions which have adopted the Illinois statute. It is constitutionally permissible to apply a long-arm statute retroactively where a defendant's substantive rights are unaffected, there being no vested right not to be sued in the jurisdiction in which the injurious effects of the defendant's acts are felt.

6. Although Minn. St. 303.13, the corporate long-arm statute, specifically excludes insurance companies from its coverage because the Insurance Code, § 60A.21, provides for service of process upon nonresident insurance corporations, and although the latter section allows service only for insurance-related acts, the legislature did not intend to permit an insurance company to escape responsibility for its tortious acts only because those acts did not involve insurance. A harmonious mesh between these sections was intended, so that if § 60A.21 does not apply, § 303.13 does.

7. Although § 303.13 expressly confers its benefit upon residents, a corporation which has its principal place of business or other significant business contacts in this state is deemed a resident for the purposes of this statute.

8. Where it appears that a corporation, through a resolution of its directors, has provided security necessary to effectuate the loan which was an important part of an alleged conspiracy to convert the total assets of an insurance company, a factual issue as to the corporation's involvement in the conspiracy is created.

9. When the officers and only owners of a closely held corporation use their holdings in that corporation to negotiate a transaction, part of an allegedly illegal scheme, they act also in behalf of that corporation, and the corporation as well as the individuals may be held responsible.

10. When a corporation, through its agents, takes part in a tortious plan, and is designated the ultimate recipient of converted funds, it has sufficient contacts with the state in which the injurious effects are felt for valid jurisdiction to be asserted against the corporation in that state.

11. Banks which do no business in a state, except for an isolated loan transaction which facilitates the conversion of the assets of an insurance company, nevertheless subject themselves to suit in that state based upon that transaction.

12. Once participation in a tortious conspiracy—the effect of which is felt in the forum state—is sufficiently established, the actual physical presence of the alleged conspirators in the state is not essential to a valid assertion of jurisdiction.

13. Although Minn. St. 543.19 by its title refers only to individuals, whereas the body embraces both individuals and corporations, there is no such coverage of different and disconnected subjects as to violate Minn. Const. art. 4, § 27.

14. Minnesota possesses subject-matter jurisdiction over an action filed by the state insurance commissioner before formal consent of the West Virginia commissioner has been obtained, notwithstanding any provision of the Uniform Liquidation of Insurance Companies Act, where the latter commissioner subsequently consented to continuance of the action.

15. A motion by defendants to dismiss the actions against them on the ground of plaintiff's failure to join a Texas receiver as an indispensable-party plaintiff was properly de-

nied on the basis of plaintiff's showing that the Texas receiver will be bound by the outcome of the action in Minnesota, thus avoiding the danger to the movant defendants of multiple liability for the same acts; provided, however, that the trial court shall allow opportunity for defendants to prove otherwise in pretrial discovery proceedings or in the trial itself, in which event the motion to dismiss should be granted.

16. Motions to serve third- and fourth-party complaints, made after 45 days after the service of summons, should be granted because, in the exceptional circumstances of this case, there is a substantial likelihood that duplication of effort and a burden upon the judicial process would otherwise result.

Affirmed in part; reversed in part.

Heard before Knutson, C.J., and Otis, Rogosheske, Sheran, and Peterson, J.J.

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## OPINION

PETERSON, Justice.

The central issue in this case is whether Minnesota can assert jurisdiction over numerous nonresident defendants in actions arising out of an alleged conspiracy to convert assets of an insurance company, most of whose policyholders are residents of Minnesota. Twenty of the original defendants are nonresident corporations and individuals; three of the defendants are residents of this state. Twelve of these, either as defendants or as third- and fourth-party plaintiffs, are involved in these appeals from various orders granting and denying motions to dismiss the actions. The result of our decision is to permit the exercise of jurisdiction by the state over all defendants named in the appeals.

The legal questions have been raised in the context of pretrial motions to dismiss, pursuant to Rule 12.02, Rules of Civil Procedure. Some of these motions were granted and some were denied, in each case primarily upon jurisdictional grounds. It is clear that in reviewing the granting of motions founded upon Rule 12(b), Federal Rules of Civil Procedure, the model for our Rule 12.02, allegations in the complaint must be taken as true. Radovich v. National Football League, 352 U.S. 445, 77 S.Ct. 390, 1 L.ed. (2d) 456; Guessefeldt v. McGrath, 342 U.S. 308, 72 S.Ct. 338, 96 L.ed. 342; Collins v. Hardyman, 341 U.S. 651, 71 S.Ct. 937, 95 L.ed. 1253; 1A Barron & Holtzoff, Federal Practice and Procedure (Rules ed.) § 350. The same standard of review must apply when reviewing denials of motions to dismiss; for if a standard more favorable to movants were established, a type of forum shopping would be encouraged in that a defendant who lost on his pretrial motion would be heartened to know that the appellate court, with the same allegations and facts before it, would demand more of the plaintiff to keep the action alive. We therefore rely on the plaintiffs' complaints and the evidence adduced at the hearings upon the various motions for a statement of the facts:[1]

North Central Fire and Casualty Co. is an insurance corporation organized under the laws of West Virginia, but it had its executive offices and transacted most of its business in Minnesota. Prior to March 24, 1966, a critical date in these proceedings, Cyril C. Sheehan, a Minnesota resident, was North Central's president and principal stockholder. Sheehan personally owed, directly and as guarantor, $295,857.84 plus interest to First National Bank of St. Paul, a national banking organization in Minnesota, and $206,-

[1]This introductory statement of facts is amplified in Part IV.

049.60 to Murphy Finance Co., a Minnesota business corporation.

Sheehan was also a primary stockholder, along with Harold L. Burke, a resident of Texas, in Pioneer General Agency, Inc., and Pioneer Casualty Company, both Texas corporations. The plaintiffs claim that Sheehan sold his interests in North Central and (along with Burke) the two Pioneer companies to Block Management Services, Inc., and Financial Funding Corporation of Nevada, Inc., respectively, allegedly the corporate arms of Donald R. Roberts, a resident of Kansas City, Missouri. Financial Funding borrowed the $645,000 purchase price from two Las Vegas banks, Bank of Nevada and Nevada State Bank. The assets of North Central, $750,000 in the form of certificates of deposit held by First National Bank, were pledged as security for the loan. This amount represented the primary reserves for North Central's insureds.

The sale of North Central and the two Pioneer companies was consummated in St. Paul on March 24, 1966, at which time First National cashed and redeemed the certificates of deposit, prior to their maturity, and transferred the cash to the two Las Vegas banks, through the correspondent Security First National Bank of Los Angeles, which in turn simultaneously transferred $645,000 to First National. The latter amount allegedly was distributed in St. Paul as follows:

| | |
|---|---|
| First National Bank of St. Paul | $301,110.05 |
| Murphy Finance Co. | 206,049.60 |
| Harold L. Burke | 24,000.00 |
| Cyril C. Sheehan | 80,340.35 |
| (Various individuals not relevant to the appeals) | 33,500.00 |
| Total | $645,000.00 |

The $750,000 wire-transferred to Las Vegas was subject to immediate seizure by the two banks under pledge agreements. They exercised this right on April 29, 1966, and retained all but $92,062.50, as payoff of the loan and for loan and escrow fees. The $92,062.50 was sent to a group of individuals, known, for reasons hereinafter stated, as the "Roberts group."

Julian M. Riley and Edward M. Yearbury, residents of Kansas City, Missouri, were Roberts' attorney and accountant, respectively, and after the March 24 purchases were elected officers of North Central. Besides being a substantial stockholder in the Pioneer companies, Harold Burke, a resident of San Antonio, Texas, was the president of Pioneer Casualty. The names of all these parties appeared on the documents which were executed in St. Paul on March 24, 1966, though it is unclear whether all the individual defendants were at that meeting.

Delta Insurance Company, Limited, is a British Commonwealth corporation with offices in the Bahamas and Kansas City, Missouri. Plaintiffs allege that Delta was the intended foreign recipient of the funds.

Joe Haveson, deputy commissioner of insurance for the State of Minnesota, moved in Ramsey County District Court to freeze the assets of North Central and on April 29, 1966, such order was issued by Judge Albin S. Pearson. Thereafter, on June 17, 1966, Judge Harold W. Schultz of the Ramsey County District Court ordered Haveson to begin duties as conservator of North Central's assets. Haveson was replaced by L. Edwin Wang and he in turn by Thomas C. Hunt, the present plaintiff.

Meanwhile, on May 19, 1966, Frank R. Montgomery, insurance commissioner for West Virginia, petitioned the Circuit Court of Cabell County, West Virginia, for an order to

take possession of the property and to liquidate the business and affairs of North Central. This request was granted on June 15, 1966.

The present action was commenced on March 12, 1968, by the Minnesota commissioner of insurance.[2] Essentially, the complaint alleges that the above-identified parties, for their own interest, conspired to deprive the creditors and policyholders of North Central of a fund upon which they had a right to rely, and asks that the defendants be held liable jointly and severally for $750,000 "or at least should be required to disgorge the amounts * * * each received." More particularly, it is claimed:

(1) The transfer of $750,000 in assets was without consideration and void if opposed by a shareholder or creditor of North Central, therefore subject to avoidance by the plaintiff.

(2) The seizure of the $750,000 in assets pursuant to the security agreement was unlawful for the same reason and must be returned.

(3) The premature payment of the certificates of deposit was contrary to Federal Reserve Regulations and caused a loss of $750,000 of North Central's assets, for which defendants are liable for damages.

(4) The defendants breached a fiduciary duty to the policyholders, entitling the plaintiff to a declaration that the $750,000 is held in trust.

(5) The defendants fraudulently converted the $750,000 and are liable for the loss.

(6) The defendants engaged in a conspiracy to defraud North Central, for which they are liable.

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[2]On February 26, 1968, Montgomery, the West Virginia commissioner, signed a "consent and authorization" giving plaintiff Hunt permission to begin suit in Minnesota. On March 29, 1968, Montgomery executed a specific consent to the prosecution of this litigation. On June 19, he filed for joinder as an additional plaintiff, and on August 12, 1968, Judge Arthur A. Stewart ordered his joinder.

Commissioner Hunt additionally commenced an action against Fidelity and Deposit Company of Maryland for payment on a $100,000 employees' fidelity bond issued by Fidelity to North Central on March 1, 1965. Soon thereafter, Fidelity began third-party actions against all the original defendants. First National likewise moved to serve third- and fourth-party complaints against various other defendants.

Defendants involved in these appeals moved in due course to dismiss the several actions. All of these motions asserted lack of jurisdiction over the nonresident defendants; but some additionally asserted a failure of the complaints to state a claim upon which relief can be granted, and one asserted a failure by plaintiffs to join a Texas receiver as an indispensable party. On September 4, 1968, Judge Arthur A. Stewart ordered that the service of summons on several of these defendants be vacated. In November, 1968, Murphy Finance moved for leave to file third- and fourth-party complaints, and on January 14, 1969, Judge Stewart granted the motion only as to those parties already made defendants in the action brought by First National. By order dated February 4, 1969, motions to dismiss First National's action, made by Roberts and Yearbury, were denied. The result of the September, January, and February orders is set forth in the footnote below.[3]

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[3]

| | Main Action | Fidelity Action | First National Action | Murphy Action |
|---|---|---|---|---|
| FIRST NATIONAL | Served | Served | | |
| MURPHY FINANCE | Served | Served | | |
| NEVADA STATE BANK | Served | Served | Served | Served |
| BANK OF NEVADA | Served | Served | Served | Served |
| DON F. ROBERTS | Dismissed | Dismissed | Served | Served |
| EDWARD M. YEARBURY | Dismissed | Dismissed | Served | Served |
| HAROLD L. BURKE | Dismissed | Dismissed | | Denied |

The appeals from these orders can be categorized:

1. Plaintiff Hunt appeals from that part of the order of Judge Stewart dismissing several defendants in the main action.[4]

2. Murphy Finance appeals the denial of leave to serve the Pioneer companies, Delta, and Harold L. Burke.[5]

3. Roberts and Yearbury appeal the denial of their motions to dismiss First National's action against them.[6]

4. The Nevada banks appeal the order subjecting them to suit in the main action[7] and in the action begun by Fidelity and Deposit.[8]

5. Fidelity and Deposit appeals from that part of the order of September 4, 1968, dismissing several defendants in its action.[9]

Upon review we hold as follows: Denials of motions to dismiss are affirmed, as are the orders granting leave to file third- and fourth-party complaints. Orders granting motions to dismiss are reversed, as are orders denying leave to file third- and fourth-party complaints.

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| | | | | |
|---|---|---|---|---|
| JULIAN M. RILEY | Dismissed | Dismissed | Served | Served |
| PIONEER CASUALTY | Dismissed | Dismissed | | Denied |
| PIONEER GENERAL | Dismissed | Dismissed | | Denied |
| DELTA | Dismissed | Dismissed | Denied | Denied |
| FIDELITY AND DEPOSIT | Served | | | |

Note: Only those parties who have asserted rights on appeal in at least one of the actions are shown. "Served" means the trial court sustained jurisdiction. "Denied" means leave to serve third- or fourth-party complaints was denied. If no motion for impleader was made, the box is blank.

[4]Appeals No. 41697 and No. 41698.

[5]Nos. 41884 and 41885.

[6]Nos. 41856 and 41857.

[7]Nos. 41699 and 41700.

[8]Nos. 41702 and 41703.

[9]No. 41701.

I.

The preliminary question is the appealability of certain orders. Although the right of a plaintiff to appeal the granting of a motion to dismiss is unquestioned,[10] whether a party can appeal from denial of such a motion is a question deserving answer. We have generally held that the denial of a motion to dismiss for lack of jurisdiction—which appears to be the only way the lower court viewed the motions—requires a different rule of review than does the granting of such a motion for other reasons.[11] In Dieseth v. Calder Mfg. Co., 275 Minn. 365, 368, 147 N.W. (2d) 100, 102, we said:

> "While the rule we follow with respect to the appealability of an order quashing service of a summons may be the minority view [see, Annotation, 30 A.L.R. (2d) 287], it has been the rule of this court since Plano Mfg. Co. v. Kaufert, 86 Minn. 13, 89 N.W. 1124, that an order *denying* a motion to quash service of summons is appealable."

It is more realistic to view such an order not merely as a retention of an action for trial, but as a determination of right, for a defendant is compelled thereby to take up the burden of litigation in this state that might otherwise be avoided.

Murphy has argued that the denial of leave to serve third- and fourth-party complaints is appealable of right. The argument is without merit. See, Chapman v. Dorsey, 230 Minn. 279, 41 N.W. (2d) 438, 16 A.L.R. (2d) 1015, and Luethi v. Stanko, 240 Minn. 380, 61 N.W. (2d) 522. However, Mur-

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[10]Rule 103.03, Rules of Civil Appellate Procedure, provides in part: "An appeal may be taken to the Supreme Court:

* * * * *

"(f) From an order which, in effect, determines the action, and prevents a judgment from which an appeal might be taken."

[11]See, Note, *Appealable Orders, Prohibition, and Mandamus in Minnesota*, 51 Minn. L. Rev. 115.

phy has additionally petitioned for discretionary review. Because we should attempt whenever possible to avoid unnecessary cost to the parties, and because the decision on Murphy's motions must be based on considerations inextricably interwoven with the factors influencing our conclusion regarding the defendants in the main action, we reach the merits of its appeal under the provision allowing for discretionary review.[12]

Nevada State Bank contends that it was error for the trial court implicitly to deny its motion to dismiss for failure to state a claim upon which relief can be granted. Denial of such an order is not appealable of right where the trial judge has not certified its importance.[13]

Both Nevada banks have vigorously urged, both below and upon appeal, that the actions against them must be dismissed because the plaintiffs have failed to join, as an indispensable party, an ancillary receiver appointed in the State of Texas. More is involved in this motion than a third-party action, brought pursuant to Rule 14, Rules of Civil Procedure, to avoid a multiplicity of actions, the situation in Chapman v. Dorsey, *supra*, and Luethi v. Stanko, *supra*. What is involved is the provision of Rule 19, Rules of Civil Procedure,[14] which is designed to protect a defendant from

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[12]Rule 105.01, Rules of Civil Appellate Procedure, states in part: "The Supreme Court, in the interest of justice and upon the petition of a party, may allow an appeal from an order not otherwise appealable under Rule 103.03 except an order made during trial."

[13]Rule 103.03(i), Rules of Civil Appellate Procedure. Even considered on the merits under our powers of discretionary review, however, and taking the plaintiff's allegations as true, a viable cause of action is clearly stated.

[14]Rule 19.01 provides in part: "A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair

multiple liability. If, as these defendants claim, the Texas receiver will not be foreclosed from suing them after termination of the present action, a failure to join him would result in irremediable damage, raising serious constitutional problems of due process. See, Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71, 82 S.Ct. 199, 7 L.ed. (2d) 139.

The considerations in weighing a motion based upon failure to join an indispensable party are quite similar to those presented by a motion to dismiss for lack of jurisdiction. The concept of indispensable parties, like that of jurisdiction—

> "* * * is a means of recognizing the importance of foreign relationships which ought not be disrupted by the application of local judicial power over parties who may be disabled from meeting obligations to others not subject to the court's power, or who may be subjected to overlapping and conflicting claims or obligations." Carrington and Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 Mich. L. Rev. 227, 235.

See, generally, Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 Yale L. J. 403. Logical analogies can also be made to a motion to intervene of right, denial of which has been held to be appealable. Thibault v. Bostrom, 270 Minn. 511, 134 N.W. (2d) 308.

The basis for disposition of the indispensable-party motions of the two Nevada banks is not detailed in the trial court's orders. Because no mention of Rule 19 was made, we have assumed that the motions were denied. We hold, in any event, as a procedural matter, that the two banks have an appeal of right from an order denying such mo-

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or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

tions, and Hunt's motion to dismiss these portions of the appeal is denied.[15]

II.

The most crucial issue in this case is whether Minnesota's "nonconsensual" long-arm statute, Minn. St. 543.19,[16] may

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[15]Our disposition of these appeals, as a substantive matter, is considered in Part VIII.

[16]Minn. St. 543.19 provides: "Subdivision 1. As to a cause of action arising from any acts enumerated in this subdivision, a court of this state with jurisdiction of the subject matter may exercise personal jurisdiction over any foreign corporation or any non-resident individual, or his personal representative, in the same manner as if it were a domestic corporation or he were a resident of this state. This section applies if, in person or through an agent, the foreign corporation or non-resident individual:

"(a) Owns, uses, or possesses any real or personal property situated in this state, or

"(b) Transacts any business within the state, or

"(c) Commits any tort in Minnesota causing injury or property damage, or

"(d) Commits any tort outside of Minnesota causing injury or property damage within Minnesota, if, (1) at the time of the injury, solicitation or service activities were carried on within Minnesota by or on behalf of the defendant, or (2) products, materials or things processed, serviced or manufactured by the defendant were used or consumed within Minnesota in the ordinary course of trade.

"Subd. 2. The service of process on any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the summons upon the defendant outside this state with the same effect as though the summons had been personally served within this state.

"Subd. 3. Only causes of action arising from acts enumerated in subdivision 1 may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

"Subd. 4. Nothing contained in this section shall limit or affect the right to serve any process in any other manner now or hereafter provided by law or the Minnesota Rules of Civil Procedure.

"Subd. 5. Non-resident individual, as used in this section, means any individual, or his personal representative, who is not domiciled or residing in the state when suit is commenced."

(It has been assumed throughout the proceedings that if this statute is available, it will be applied through subd. 1[c].)

be applied retroactively as an effective means of obtaining personal jurisdiction over the nonresident defendants. The statute was enacted subsequent to the time of the alleged wrongful acts giving rise to the present action. The trial court held that the statute had no retroactive application.

The nonresident defendants have presented strong arguments against retroactive application. One of our statutory canons of construction, § 645.21, provides:

> "No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature."

And it is obvious that § 543.19 is silent as to the extent of its application. The nonresident defendants forcefully contend that to allow after-enactment service under § 543.19 would be a complete reversal of our longstanding case law. Even though language in the following cases cited by defendants made no such distinction, it is demonstrable that, with one exception, the cases distinguishably involved either the construction of a "consensual" long-arm statute or a situation in which the retroactive application of a statute would substantially affect the outcome of the action on the merits:

*a.* Chapman v. Davis, 233 Minn. 62, 45 N.W. (2d) 822. On July 18, 1943, the plaintiff was injured by the defendant's negligent manipulation of a wheel jack while changing tires. An action was commenced in 1949, the same year an amendment to a provision of the Safety Responsibility Act enlarged the jurisdictional reach of the Minnesota courts by allowing a plaintiff to serve the commissioner of highways as the attorney of both nonresident *and* resident drivers. The defendant was a Minnesotan at the time of the injury but had since moved out of the state. Minn. St. 1949, § 170.55, under which plaintiff was claiming jurisdiction, provided that the use of a motor vehicle within Minnesota

"shall be deemed an appointment * * * of the commissioner of highways to be [the driver's] * * * attorney" upon whom service could be made, and that such use would constitute a "signification of * * * agreement" that such service would be legally effective. The statute may thus be classified a "consensual" long-arm statute.

We do not ignore the flat pronouncement of the court (233 Minn. 65, 45 N.W. (2d) 824) that § 645.21, as a canon of construction, is "expressive of the principle that the courts will presume that a statutory enactment applies to the future and not to the past * * * without making any distinction between laws relating to procedure and those pertaining to substantive rights." It will be noted, however, that the statute was an amendment to an existing statute, so that decision was based also upon § 645.31, a canon of construction providing that an amendment merges into the prior law but shall be effective only from the time the amendment is passed. Statutory canons of construction or presumptions of legislative intent, as we note later, must be considered along with other canons of construction and indicia of legislative intent.

Chapman cited Ogren v. City of Duluth, 219 Minn. 555, 18 N.W. (2d) 535, as authority for its sweeping pronouncement against retroactive application of statutes effecting either procedure or substantive rights. In that case a deceased fireman's wife filed a claim for workmen's compensation benefits on October 25, 1943. The alleged cause of death was employment-caused myocarditis. A 1941 statute created a presumption that if people in certain employment, including fire fighting, contract certain diseases, including myocarditis, the disease is employment-related. A 1943 statute effective before the filing of the claim, but after the fireman's death, repealed this presumption (which the court

labeled "procedural") and, in addition, changed several substantive rules of law regarding disability, which it is unnecessary to discuss. In determining which statute applied, the court said (219 Minn. 562, 18 N.W. (2d) 539):

> "* * * There is nothing in the 1943 statute showing that it should *not* operate prospectively as to matters of procedure and evidence. Such matters do not affect rights accrued. * * * The result is that matters of procedure and evidence are governed by the law in force when the right to compensation is *asserted*. [Citing cases.] As applied here, the result of such construction is that the *substantive* rights of the parties are controlled by the 1941 statute. * * * The procedural and evidentiary provisions governing the assertion of that right [to compensation] are those contained in the *1943* statute." (Italics supplied.)

It is to be noted that § 645.21 was in effect when Ogren was decided. It is clear that the court nevertheless applied the procedural aspects of the 1943 statute retroactively. What Chapman must be taken to mean, then, is that procedural statutes based upon consent and statutes affecting substantive rights will not be applied retroactively.

*b.* Ekstrom v. Harmon, 256 Minn. 166, 167, 98 N.W. (2d) 241, 242. The plaintiff was struck by a car three days before the effective date of a law establishing a presumption that the deceased was acting with due care. The language of Chapman v. Davis, *supra*, permitted a facile resolution of the case:

> "* * * It is unnecessary for us to determine whether the presumption established by § 602.04 involves a law of procedure or a substantive law since this court in Chapman v. Davis, 233 Minn. 62, 65, 45 N.W. (2d) 822, 824, after quoting the presumption against retroactive application of statutes in § 645.21, held:
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> "'* * * § 645.21 applies to all laws without making any distinction between laws relating to procedure and those pertaining to substantive rights.'

"This case has since been followed at least twice."[17]

*c.* Marsolek v. Miller Waste Mills, 244 Minn. 55, 69 N.W. (2d) 617. The issue was whether a 1947 amendment to the statute controlling the manner in which workmen's compensation payments were to be made should be applied to an injury occurring in 1944. The amendment so changed the wording of the provision that, as a substantive matter, the injured party would recover more than he would have under the law existing in 1944, a result the court held would violate the rule of Chapman v. Davis, *supra*.

*d.* Majerus v. Walk (D. Minn.), 275 F. Supp. 952. The plaintiff's mother purchased some sausage from a store in Iowa and brought it to her daughter's home in Austin, Minnesota. The daughter became ill after eating it and sued the Iowa merchant in the Minnesota Federal Court, using § 543.19 to gain jurisdiction. The cause of action accrued on February 18, 1966, the law became effective on May 16, 1967, and service was made on August 25, 1967. The court quoted § 645.21, adding (275 F. Supp. 954):

> "* * * A well-established line of Minnesota decisions holds, in closely analogous situations, that a procedural statute permitting service upon individuals beyond the state is not to be applied retroactively to causes of action accruing prior to its promulgation. [Citing Hinton v. Peter, 238 Minn. 48, 55 N.W. (2d) 442; Hughes v. Lucker, 233 Minn. 207, 46 N.W. (2d) 497; Chapman v. Davis, *supra*.] Other Minnesota decisions have refused to permit retroactive application of other procedural statutes. [Citing Ekstrom v. Harmon, *supra*; Marsolek v. Miller Waste Mills, *supra*.]"

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[17] Hughes v. Lucker, 233 Minn. 207, 46 N.W. (2d) 497; Marsolek v. Miller Waste Mills, 244 Minn. 55, 69 N.W. (2d) 617. See, Guerra De Chapa v. Allen (S.D. Tex.), 119 F. Supp. 129; 133.

Hughes v. Lucker, *supra*, involved the application of Minn. St. 170.55, as did Hinton v. Peter, 238 Minn. 48, 55 N.W. (2d) 442, another case cited by the respondents.

The result in Majerus does support defendants' position. Majerus is not independent authority for that position, however, in the sense that it simply undertook to apply the Federal court's interpretation of the state's case law.

We think the most basic interest of our legislature in enacting § 543.19 was to afford maximum protection to this state's residents injured by acts of nonresidents; that is, to extend the extraterritorial jurisdiction of our courts to the maximum limits consistent with constitutional limitations. Regardless of statutory canons of construction, the legislature could not have intended retroactively to alter substantive rights, such as changes in a plaintiff's measure of recovery. It would, at the same time, require too great a mental feat to conceive of retroactive appointment of an agent, the fiction upon which earlier consensual long-arm statutes were based.[18] The retroactive application of § 543.19, simply a procedural permission to sue, does not rely upon consent and does not alter any substantive right of a nonresident defendant.

Our emphasis on alteration of substantive rights and retroactive consent is not novel. The important case of Nelson v. Miller, 11 Ill. (2d) 378, 382, 143 N.E. (2d) 673, 676, involving the long-arm statute upon which Minn. St. 543.19 is modeled, articulated this first distinction:

> "* * * The law applicable in the State of Illinois is that there is no vested right in any particular remedy or method of procedure, and that, while generally statutes will not be construed to give them a retroactive operation unless it clearly appears that such was the legislative intent [in effect what Minn. St. 645.21 says], nevertheless, when a change of law merely affects the

[18]The same distinguishing principle would apply to Minn. St. 303.13, subsequently considered in this opinion.

remedy or law of procedure, all rights of action will be enforceable under the new procedure without regard to whether they accrued before or after such a change of law and without regard to whether the suit has been instituted or not, unless there is a saving clause as to existing litigation." [19]

The second distinction has been recently summarized in Annotation, 19 A.L.R. (3d) 138, 141:

"* * * [A] distinction has been made between statutes which provide by their terms merely that the acts or transactions specified therein shall be the basis of the jurisdiction of local courts over * * * nonresidents or foreign corporations, and statutes, often called 'implied consent' statutes, which by their terms provide that such acts or transactions are deemed to be the consent of the nonresident or foreign corporation to the appointment of a local officer as agent for the purpose of service of process. The general rule that, in the absence of a statutory provision to the contrary, statutes pertaining to procedure operate retrospectively, has been applied to long-arm statutes of the first kind. Under this view the retroactive application of such a statute is not precluded by the fact that the act or transaction upon which jurisdiction is predicated occurred prior to the effective date of the statute. On the other hand, 'implied consent' statutes have generally been held not to operate retroactively * * *. This rule rests

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[19] Third- and fourth-party plaintiff First National and plaintiff Hunt argue that the use of § 543.19 in this case is actually not a retroactive application. Support of this statement is found in 50 Am. Jur., Statutes, § 476: "A retrospective law, in the legal sense, is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past." See, also, Cox v. Hart, 260 U.S. 427, 43 S.Ct. 154, 67 L. ed. 332; Chovan v. E. I. DuPont DeNemours & Co. (E.D. Mich.), 217 F. Supp. 808; Hoen v. District Court, 159 Colo. 451, 412 P. (2d) 428. However, the rationale for the conclusion that it is not a retrospective application when a procedural law is relied upon in a suit where the cause of action accrued before the law's effective date is the same as that which distinguishes the cases involving procedural issues from those involving substantive rights.

> on the view that neither as a matter of statutory construction nor as a matter of constitutional law is it possible to imply consent retroactively."

The origin of Minn. St. 543.19 in a comparable Illinois statute invokes yet another canon of construction, for § 645.22 provides:

> "Laws uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them." [20]

The Illinois statute upon which § 543.19 is modeled was applied retrospectively in Nelson v. Miller, *supra*, and this decision has been followed by the majority of courts faced with the question of retroactive application of an Illinois-type long-arm statute. Teague v. Damascus (E. D. Wash.), 183 F. Supp. 446, is an example. The defendants had committed a tort on August 17, 1958. The long-arm statute became effective June 11, 1959. The general rule in Washington, similar to that in Minnesota, was that statutes are to be construed as prospective unless there is clear legislative directive to the contrary. The court followed the Illinois approach because the statute brought its own interpretation (183 F. Supp. 448):

> "The statute in question we find was adopted from and copies an earlier Illinois statute. The Supreme Court of the State of Washington is committed to the proposition that a statute adopted from another state or country is presumed to have been taken with the construction there placed upon it."

See, also, Clews v. Stiles (10 Cir.), 303 F. (2d) 290 (where the Court of Appeals assumed that the New Mexico Supreme

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[20] See, also, Congdon v. Congdon, 160 Minn. 343, 200 N.W. 76; Nicollet Nat. Bank v. City Bank, 38 Minn. 85, 35 N.W. 577; 50 Am. Jur., Statutes, §458.

Court would adopt the Illinois interpretation because New Mexico had adopted the Illinois statute); Hoen v. District Court, 159 Colo. 451, 412 P. (2d) 428; Woodring v. Hall, 200 Kan. 597, 438 P. (2d) 135.

Chovan v. E. I. DuPont DeNemours & Co. (E. D. Mich.), 217 F. Supp. 808, has been a helpful opinion because the arguments and statutory context were quite similar to those in the present situation. The action was for wrongful death. Samuel Chovan, a miner, was killed in October 1958 when allegedly defective blasting caps and fuse lighters manufactured by defendants caused a premature dynamite explosion. The Michigan Revised Judicature Act became effective January 1, 1963, and service was made January 2, 1963. The relevant portion of the new law provides (Mich. Stat. Ann. § 27A.715):

> "The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable the courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against such corporation arising out of the act or acts which create any of the following relationships:
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> * * * * *
>
> "(2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort."

Another section of the act[21] states that unless clearly provided, § 27A.715 must not "affect" any past act. But the court allowed use of the new long-arm law, distinguishing,

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[21] Mich. Stat. Ann. § 27A.9905 provides in part: "Except as specifically stated or reasonably inferred from the provisions of this act, this act shall not impair or affect any act done, offense committed or right accruing, accrued, or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time this act takes effect, but the same may be enjoyed, asserted, enforced, prosecuted, or inflicted as if this act had not been passed."

as we have, the cases dealing with substantive rights ("The rule which forbids application of new enactments or revisions to pending actions generally applies only to statutes dealing with substantive rights." 217 F. Supp. 810) and those dealing with consensual long-arm statutes ("This fictional agency relationship provided the basis for the state's jurisdiction over the non-resident. Accordingly, if the effective date of such a statute was subsequent to the motorist's entry, the statute was held not to have created a prior agency relationship which in fact did not exist." 217 F. Supp. 811).[22]

It is constitutionally permissible to apply § 543.19 as we do today. In McGee v. International Life Ins. Co., 355 U.S. 220, 224, 78 S. Ct. 199, 201, 2 L. ed. (2d) 223, 226, the alleged contacts with the California plaintiff occurred before the California jurisdictional statute became law, and, while the case involved a contract and not tort, the court's reasoning is relevant:

> "* * * Respondent contends that application of the statute to this existing contract improperly impairs the obligation of the contract. We believe that contention is devoid of merit. The statute was remedial, in the purest sense of that term, and neither enlarged nor impaired respondent's substantive rights or obligations under the contract. It did nothing more than to provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent. At the same time respondent was given a reasonable time to appear and defend on the merits after being notified of the suit. Under such circumstances it had no vested right not to be sued in California."

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[22]Other cases dealing with retrospective application of long-arm statutes are collected in 19 A.L.R. (3d) 138 and 2 Moore, Federal Practice (2 ed.), par. 4.41-1[3], p. 1291.56, n. 23.

The first constitutional test of the Illinois-model non-consensual long-arm statute came in Nelson v. Miller, 11 Ill. (2d) 378, 382, 143 N.E. 673, 675, where the court said:

> "We consider first the defendant's contention that the new provisions of the statute cannot be applied to him because the cause of action arose before the effective date of the provisions authorizing extraterritorial service on nonresident defendants. Insofar as this claim is based on the Federal constitution it is without merit. Sections 16 and 17 do 'not extend either to destruction of an existing cause of action or to creation of a new liability for past events.' Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 554 (1949); see also Ex parte Collett, 337 U.S. 55, 71 (1949); *cf.* Federal Rules of Civil Procedure, Rule 86.
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> * * * * *
>
> "* * * Retrospective application of such a statute creates a problem only if that application operates unfairly against a litigant who justifiably acted in reliance on some provision of the prior law."

Retroactive exercise of jurisdiction based upon tortious injury is highly unlikely to frustrate expectations. With a conspiracy, as is here alleged, there may be actual reliance, but it is not one this court should protect. Certainly it is not enough to approach constitutional dimensions. While McGee did not foreclose the constitutional issues presented by jurisdictional retroactivity, the Supreme Court's summary analysis of the problem makes it clear that a constitutional objection will not be sustained absent an extreme factual situation. See, Note, *Retroactive Expansion of State Court Jurisdiction Over Persons*, 63 Col. L. Rev. 1105, 1124; Restatement, Conflict of Laws (2d) Proposed Official Draft, § 36, *comment e.*

We hold, therefore, that § 543.19 is retroactive in its application. The effect of this holding is to validate service upon the individual defendants. It also validates service on

Delta under Minn. St. 543.19.[23] It is unnecessary to decide when Fidelity's cause of action arose, itself a vigorously disputed point of law; treating it for present purposes as arising at the same time as Hunt's, Fidelity's service under § 543.19 is sufficient to subject the defendants to suit in its third-party action.[24] In addition, this holding disposes of the issues raised in the appeals from the refusal to dismiss the third- and fourth-party actions brought by First National against Roberts and Yearbury,[25] and answers a major question in Murphy's appeals from denial of leave to serve Delta, Burke, and the Pioneer companies.[26]

Finally our conclusion renders moot the question of the validity of Hunt's service, pursuant to Rule 14, Rules of Civil Procedure, of those defendants (Roberts and Yearbury) he was unable to serve in the main action but was allowed to serve in a third-party action because the defendants had been successfully served by First National.[27]

III.

Not all the defendants were served under Minn. St. 543.19. The two Pioneer companies were served by Hunt under § 303.13, and Pioneer Casualty was also served under § 60A.21. Although the trial court did consider the applica-

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[23]The appeals on which Delta and Hunt argued this point are Nos. 41697 and 41698.

[24]The adequacy of Fidelity's service was an issue in the appeals of the third-party action against Nevada State Bank (No. 41702) and Bank of Nevada (No. 41703), and in Fidelity's appeal relating to dismissal of defendants Roberts, Riley, Yearbury, and Delta by the trial court's September 4 order (No. 41701).

[25]Nos. 41856 and 41857.

[26]Nos. 41884 and 41885.

[27]No. 41855. In an effort to avoid confusion, this appeal was not mentioned in the general discussion of the factual and procedural background of this case.

bility of these statutes, it dismissed the actions against these two companies on the ground that there was no showing of a contract made with a Minnesota resident or a tort committed in Minnesota. Before discussing in Part IV the issue posed by the different statutory grounds stated, we should first consider the more specific application of §§ 303.13 and 60A.21 as a statutory vehicle to reach these two defendants. The first statute provides in part:

> "Subdivision 1. A foreign corporation shall be subject to service of process, as follows:
>
> * * * * *
>
> "(3) If a foreign corporation makes a contract with a resident of Minnesota to be performed in whole or in part by either party in Minnesota, or if such foreign corporation commits a tort in whole or in part in Minnesota against a resident of Minnesota, such acts shall be deemed to be doing business in Minnesota by the foreign corporation and shall be deemed equivalent to the appointment by the foreign corporation of the secretary of the State of Minnesota * * * to be its true and lawful attorney * * *."

The word "corporation" is defined in § 303.02, subd. 4:

> "'Foreign corporation' does not include any corporation * * *, under the constitution and statutes of the United States, * * * [or] insurance companies as defined by Minnesota Statutes, Section 60.02 * * *."

Section 60.02, repealed and reenacted as § 60A.02; reads in part:

> "Subd. 4. 'Company' or 'insurance company' includes every insurer, corporation, business trust, or association engaged in insurance as principal."

Pioneer General *Agency* is not an insurance company as defined by the statute, but Pioneer Casualty may be. As a safeguard, then, Hunt additionally served Pioneer Casualty under the second statute, § 60A.21, subd. 2, which provides in part:

"(1) Any of the following acts in this state effected by mail or otherwise by an unauthorized foreign or alien insurer: (a) the issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein; (b) the solicitation of applications for such contracts; (c) the collection of premiums, membership fees, assessments, or other considerations for such contracts; or (d) any other transaction of insurance business, is equivalent to and shall constitute an appointment by such insurer of the commissioner of insurance and his successor or successors in office to be its true and lawful attorney upon whom may be served all lawful process in any action, suit, or proceeding instituted by or on behalf of an insured or beneficiary *arising out of* any such contract of insurance * * *." (Italics supplied.)

We see no inconsistency in the use of § 303.13 against defendant Pioneer Casualty. It is obvious that this statute extends jurisdiction over the nonresident defendant for insurance-related happenings. Hunt has not seriously claimed that this defendant's insurance transactions in Minnesota were the cause of this suit. Rather, his allegations sound in tortious conversion, so that the character of the defendant's business, whether as insurer or otherwise, is quite unimportant for these purposes. Section 303.13 by its reference to the Insurance Code shows that the former was not intended to cover what § 60A.21 covers; and it can be inferred that if § 60A.21 doesn't apply (and it would not when the insurance company has contacts not related to insurance), then § 303.13 does. There was an intended harmonious mesh between these two jurisdictional statutes; the legislature cannot have meant to grant immunity to the corporation aiding in a tortious conversion in Minnesota

merely because that organization is an insurance company.[28]

IV.

With respect to the ground upon which the trial court dismissed the actions against the Pioneer companies, we reach a different conclusion. The available facts are based upon documentary evidence rather than any resolution of testimonial conflict, as to which we would be required to defer to the trial court. We think the allegations of the complaint and the collateral evidence, taken as true, sufficiently establish a factual *issue* as to the role of the Pioneer companies, as corporate entities, in the alleged conspiracy. The security arrangement between North Central and the Nevada State Bank under which the former's assets were used as a "guarantee deposit" to effectuate the loan by the Nevada banks to Financial Funding is set forth in a "commitment

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[28]Also served under § 303.13 were the two Nevada banks, which argued that because the statute by express reference authorizes its use for residents of Minnesota, North Central, being a West Virginia corporation, is excluded. That reference reflects the primary concern of the legislature for residents, but reflects no intention to use that term in its most technical sense. We agree with the conclusion of Judge Larson in United Barge Co. v. Logan Charter Service, Inc. (D. Minn.), 237 F. Supp. 624, where he held that Cargill Corporation, a Delaware corporation with a base in Minnesota, could use § 303.13 to reach a Louisiana defendant, based upon the fact that, notwithstanding its foreign incorporation, Cargill had its principal place of business in Minnesota and had extensive contacts within the state. He reasoned (237 F. Supp. 629): "• • • [T]he restriction of the right to sue to residents of the State can best be understood as an attempt to insure that the jurisdiction the State was attempting to exert would be valid within the due process clause. The Legislature was extending its protection only to those parties for whom the State had a considerable interest in providing a forum because of their continuous and established contacts with Minnesota. Thus viewed, the crucial test as to whether a foreign corporation should be classed as a resident for the purposes of the One Act Statute would appear to be a consideration of the extent of its contacts with the State."

In the instant case, moreover, the ultimate injury was to the creditors and policyholders of North Central, most of whom are admittedly Minnesotans and to whom the Minnesota Legislature would obviously not intend to deny protection of the statute.

agreement," signed March 24, 1966.[29] Paragraph 6 of that document states:

> "Borrower will pledge to Nevada State as collateral security for the payment of the aforesaid promissory note, all of the issued and outstanding capital stock of Pioneer Casualty Company, Inc., a Texas corporation, and Pioneer General Agency, Inc., a Texas corporation, both of San Antonio, Texas."

Other documentary evidence would raise an inference that the role of the Pioneer companies was not merely passive, but active, involvement in a crucial early stage of the alleged scheme. In a letter dated March 21, 1966, from Cyril Sheehan and Harold L. Burke to R. E. Fawcett, Jr., vice president of the Frost National Bank of San Antonio, Texas, Sheehan and Burke requested that certain stocks be sent to the First National Bank of St. Paul and thence to the Nevada State Bank, "for safekeeping by such bank in accordance with *a resolution* previously passed by Pioneer General Agency, Inc. and heretofore furnished to the Nevada State Bank, Las Vegas, Nevada, or its representatives." (Italics supplied.) This stock, according to the theory of Hunt's action, was to be used as a good-faith deposit, as "collateral security." Sheehan and Burke, in essence, were using their available assets in North Central and the Pioneer companies to secure the loan to Roberts.

Although Pioneer Casualty did not pass a resolution or take as clear-cut corporate action as Pioneer Agency did, when the officers and only owners of a corporation—closely held as this was—use their interests to negotiate an alleged fraudulent transaction involving the sale of that closely held corporation, it can be said that the owners, although

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[29] Julian Riley signed for North Central, as its President. Hunt maintains that since Riley is a member of the "Roberts group," his signature indicates that the "new management" was in control when this agreement was signed.

acting in their individual interests, acted also for the corporation. Acts of managing officers or directors constitute "business of the corporation though unauthorized by its charter." Ballantine, Corporations (Rev. ed. 1946) § 111. This is so even if the officers practice ultra vires deceit, Myzel v. Fields (8 Cir.), 386 F. (2d) 718, 749; Brennan v. Midwestern United Life Ins. Co. (N.D. Ind.), 259 F. Supp. 673, 681; and even if the tortfeasor received no benefit therefrom, James-Dickinson Farm Mtge. Co. v. Harry, 273 U.S. 119, 123, 47 S.Ct. 308, 310, 71 L.ed. 569, 574; Myzel v. Fields, *supra*.

As an aid to understanding what Burke allegedly stood to gain by these complicated financial dealings, it is appropriate to recite some of the details of the purchase agreement between Sheehan and Burke as sellers and Financial Funding as buyers, dated March 24, 1966, and signed by Yearbury for Financial Funding. That document states that Sheehan owned 250 shares and Burke, 240 shares of Pioneer Agency stock. (And Pioneer Agency owned Pioneer Casualty.) Sheehan also owned a $50,000 face-value surplus debenture issued by Pioneer Casualty. Sheehan's stock and debenture were sold for $375,000. Burke sold his stock for $24,000 and took an assignment of an $11,000 interest in the $50,000 surplus debenture, a sum equal to 10 per cent of the underwriting profits of Pioneer Casualty for five years, and one per cent of the net profits of Pioneer Casualty for five years. Financial Funding also agreed to pay off a $20,000 note owed by Pioneer Agency to the Harris family of San Antonio.

The trial court's dismissal of Delta was, as in the case of the Pioneer companies, based upon the absence of any showing of factual connection with the alleged conspiracy. The claims as to Delta's role in the conspiracy are hesitant,

sometimes even self-contradictory. Justice nevertheless warrants an examination of the merits of the main, third-, and fourth-party actions against Delta on the basis of the prima facie case that has been constructed against it.

It is alleged that Delta, as another corporation controlled by Roberts, was the intended final recipient of the $750,000; and that Delta was represented in Minnesota by Roberts, Riley and/or Yearbury, none of whom has disputed his presence in St. Paul on March 24. If true, there would be a sufficient basis for the assertion of jurisdiction over Delta. The allegations as to Delta's role are not wholly without evidentiary support, although their legal significance is arguable. On April 23, 1966, Delta agreed to reinsure 90 per cent of North Central's business, in return for $750,000 in certificates of deposit. North Central was to receive as a "ceding commission" a surplus premium note for $255,125, bearing interest at five per cent per year and providing for principal payment at 2½ per cent of all premium income received by Delta. Delta actually assumed certain of North Central's obligations and appointed a Minnesota resident as agent to carry out the duties owed the insureds.[30] Delta will have ample opportunity at trial to rebut the assumptions upon which jurisdiction is founded and, of course, the allegations which would establish liability.

The Las Vegas banks have argued with vigor that there is no indication whatever of their participation in any unlawful plan. Whether it was unlawful will have to await full trial, but there are sufficient facts from which to conclude that they were included in a plan. It is clear, as to Nevada State Bank, that on March 24, 1966, its vice presi-

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[30] When the Las Vegas banks learned of the reinsurance agreement, it may be noted, they exercised their security rights, as a result of which the final stage in the alleged plan broke down.

dent, W. W. Rogers, flew to St. Paul and executed on behalf of his bank several of the documents there circulated. It was not until March 25, 1966, however, that Bank of Nevada purchased $250,000 worth of the loan to Financial Funding. Although that part of the transaction occurred the day after the March 24 contact with Minnesota, it is unrealistic, at least at this point, to view such purchase as a business coincidence. It would be an improbable assumption that a participation in a quarter-of-a-million-dollar loan occurred with only two or three hours' deliberation and wholly without any information as to its background. The crediting and debiting of accounts at the Los Angeles correspondent bank on March 24 involved both Nevada State Bank and Bank of Nevada. The commitment agreement, likewise dated March 24, states that Time Certificates 5651 to 5675 "issued by Bank of Nevada" were delivered by North Central to Nevada State Bank as evidence of the former's good faith.

Two of the alleged conspirators evinced their own understanding that the Bank of Nevada was to be a participant with the Nevada State Bank. A letter from a vice president of Nevada State Bank, Calvin S. Smith, to former Minnesota Attorney General Robert Mattson, dated June 22, 1966, states:

> "Our Senior Vice President, Mr. W. W. Rogers, Jr., visited St. Paul with instructions not to release the cashier's check of our bank and of the associated bank, Bank of Nevada, in the amount of $645,000.00, until he had actually in his possession $750,000.00 in a cashier's check."

And in a resolution of the North Central Board of Directors, dated March 24, 1966, it was agreed—

> "* * * that the President, Julian M. Riley, of this corporation, and the Secretary, H. Carl Balsiger, of this corporation, be and they hereby are authorized and directed to deposit with Nevada State Bank and

Bank of Nevada, both Nevada banking corporations, funds of the Corporation in the amount of $750,000.00, to purchase Certificates of Deposit in said banks."

It is undisputed that the great majority of defendants, both corporate and individual, were present at the important St. Paul meeting on March 24, either in person or by an agent. Our statute, however, does not require a finding that each defendant be physically present in this state at the time the conspiracy has its fruition. Once participation in a tortious conspiracy—the effect of which is felt in this state—is sufficiently established, actual physical presence of each of the alleged conspirators is not essential to a valid assertion of jurisdiction. This construction of our statute follows from the premise that the legislature intended the statute to reach as far as constitutional limitations would permit.

V.

We must consider, then, whether such application of our statutes conforms to the due-process limitations of the Fourteenth Amendment. In the familiar case of International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.ed. 95, 102, the Supreme Court said:

> "* * * [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

Subsequent cases, especially McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.ed. (2d) 223, and Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.ed. (2d) 1283, have indicated that there are no mechanical or quantitative constitutional limits on the exercise of jurisdiction, that what is "fair" will vary with each case. The extent of the contacts minimally required for constitutional due proc-

cess has been the subject of considerable legal literature. Professor David Currie has written:

> "* * * Probably the most that can be said in a general way is that due process embodies a test of fundamental fairness in all steps of the proceedings; that our sense of fairness is outraged by certain assertions of jurisdiction on the part of States unconnected with the parties or with the controversy; and that this sense of unfairness stems partly from the inconvenience and expense involved, partly from the idea of unfair surprise, partly from anticipation of an improper choice of law, and partly from more general notions of the limits of a state's rightful sovereignty."

Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. of Ill. L. Forum, 533, 535.

At least two writers go beyond this flexibility concept by categorizing requisite minimal contacts according to a hierarchy of interests which a long-arm statute may properly protect. Carrington and Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 Mich. L. Rev. 227. They suggest, for example, that assertion of long-arm jurisdiction in a libel case may require a stronger showing than in other types of actions.[31] Unlike the additional First Amendment considerations in such a hierarchy of values, the present tort action is plainly subject to no such countervailing interests. A tort action, indeed, traditionally requires even less contact with the forum than an ordinary action in contract. See,

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[31]This view has the support of the Court of Appeals for the Fifth Circuit. See, New York Times Co. v. Connor, 365 F. (2d) 567; Buckley v. New York Times Co., 338 F. (2d) 470.

*Developments in the Law: State-Court Jurisdiction*, 73 Harv. L. Rev. 909, 926.[32]

Assertion of jurisdiction over all the defendants in this case does not offend our notions of fundamental fairness. There is no apparent inconvenience of the forum, and, as a practical matter, the nature of the litigation and the situation of the available witnesses and evidence makes it rather apparent that any single defendant, if not tried in this forum and in these same proceedings, would probably not face trial anywhere. Minnesota, so far as appears, is the only state having significant contacts with all the defendants to this complicated multiparty litigation.[33] With respect to those several defendants who appeared in St. Paul on March 24, 1966, to say that it would be unfair to subject them to suit would mean that the line of convenience is drawn between coming to Minnesota to conspire and coming to Minnesota to defend an action based upon the conspiracy. With respect to any of the defendants, to suggest that it is unfair to require them to respond to an action in

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[32]Consistent with the thesis that the type of contact is important is the attempt by some commentators to define certain activities that so justifiably invoke the protective interests of the state that only minimal contacts are necessary. Among such activities are operation of a motor vehicle (Hess v. Pawloski, 274 U.S. 352, 47 S. Ct. 632, 71 L. ed. 1091); dealing in securities (Henry L. Doherty & Co. v. Goodman, 294 U. S. 623, 55 S. Ct. 553, 79 L. ed. 1097); and dealings in insurance (McGee v. International Life Ins. Co., 355 U. S. 220, 78 S. Ct. 199, 2 L. ed. [2d] 223).

[33]Our decision on these appeals, it is appropriate to underscore, is not determinative of the issues of jurisdictional fact as they may relate to a judgment on the merits. As the trial progresses, it may be made more manifest that contacts of a defendant with this forum and the alleged conspiracy have not been in fact established, in which event it will be for the trial court to consider a defendant's renewed motion to dismiss. According to some of the parties, a trial court order precluded extended discovery that might well have developed additional evidence relevant to the issue of jurisdiction. We assume this order may now be modified preparatory to trial upon the merits.

this jurisdiction would seem to say that they may rely on our contract law to uphold the terms of lawful agreements but that they may not be required to defend an action based on injury to our citizens as a result of an unlawful agreement.

If one of these defendants had injured a Minnesota resident in driving a rented car from the airport to the meeting in St. Paul, on March 24, 1966, none would challenge assertion of Minnesota jurisdiction. Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.ed. 1091. And even if it were a defendant's agent who came into this state and injured a Minnesotan, liability for the tort would just as clearly exist. Nelson v. Miller, *supra*. How, then, should we decline jurisdiction when the agent arrives at his location and participates in other tortious conduct, the result of which is injurious to numerous Minnesotans? Similarly, a supplier of goods is subject to the power of the state in which the defects bring about harmful physical effects. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. (2d) 432, 176 N.E. (2d) 761; Aftanase v. Economy Baler Co. (8 Cir.), 343 F. (2d) 187 (construing Minn. St. 303.13); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A. (2d) 664, 25 A.L.R. (2d) 1193. How, then, should it be offensive to assert jurisdiction of an action against persons who intentionally set in motion financial actions of the kind alleged in this case, the inescapable effect of which is to injure Minnesotans?

Jack O'Donnell Chevrolet, Inc. v. Shankles (N.D. Ill.), 276 F. Supp. 998, in a situation quite similar to the instant case, answers these rhetorical questions. Plaintiff, an Illinois car dealer, alleged that defendant, an Alabama bank, was conspiring with a car buyer to honor only those of the buyer's drafts which he gave specific authority to honor. The

Federal District Court refused to quash service under the Illinois long-arm statute, ruling that it was permissibly applicable to subject the Alabama bank to Illinois jurisdiction. Relevant to the construction we have made of our own comparable statute, the court said (276 F. Supp. 1002):

> "* * * [C]ases interpreting Gray [Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. (2d) 432, 176 N.E. (2d) 761] have confirmed that an actor need not be physically present in Illinois in order to commit a 'tortious act' which would subject him to jurisdiction under [the Illinois act]. * * * The cases cited by defendant in support of his motion, antedated Gray, and were based upon an outdated conception of due process requirements, namely that the actor must have been physically present in the state of injury, and accordingly they are no longer controlling. It cannot be seriously contended any longer that the personal 'presence' of a nonresident defendant is necessary, in this state, in order for it to be subjected to the *in personam* jurisdiction of this court."

VI.

Quite a different constitutional hurdle has been erected by the Las Vegas banks in defense to the third-party actions brought by Fidelity. Minn. St. 543.19, under which Fidelity made service upon them, in its body recites express authority to exercise personal jurisdiction over "any foreign corporation or any non-resident individual." When enacted, however, it was entitled "An act relating to the service of process upon non-resident individuals." L. 1967, c. 427. Minn. Const., art. 4, § 27, provides that "[n]o law shall embrace more than one subject, which shall be expressed in its title."

The reason for this constitutional provision has been stated in State ex rel. Pearson v. Probate Court, 205 Minn. 545, 551, 287 N.W. 297, 300, affirmed, 309 U.S. 270, 60 S.Ct. 523, 84 L.ed. 744, 126 A.L.R. 530:

> "The objects of the constitutional provision have been often expressed in the decisions of this court. They are, first, to prevent 'log-rolling legislation' or 'omnibus bills,' by which a large number of different and disconnected subjects are united in one bill and then carried through by a combination of interests; and, secondly, to prevent surprise and fraud upon the people and the legislature by including provisions in a bill whose title gives no intimation of the proposed legislation, or of the interests affected."

Its basic meaning was stated in Johnson v. Harrison, 47 Minn. 575, 577, 50 N.W. 923, 924, 28 A.S.R. 382, 384:

> "* * * All that is necessary is that the act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject." [34]

We hold, by reference to these principles, that the statute is not fatally defective. The subjects are not fundamentally different or disconnected. The legislators could not have been misled by the title to this statute, which was to reach nonresidents who had injured Minnesota citizens. There is no reason to think that a legislator voting to allow the state's long-arm statute to reach individuals would have voted differently as to its reaching corporations.

VII.

Although lack of personal jurisdiction is the principal

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[34] See, also, State v. Gut, 13 Minn. 315 (341); State ex rel. Olson v. Erickson, 125 Minn. 238, 146 N.W. 364; Sverkerson v. City of Minneapolis, 204 Minn. 388, 283 N.W. 555, 120 A.L.R. 944; Blanton v. N. P. Ry. Co., 215 Minn. 442, 10 N.W. (2d) 382; City of Duluth v. Cerveny, 218 Minn. 511, 16 N.W. (2d) 779; State v. Meyer, 228 Minn. 286, 37 N.W. (2d) 3. That it is to be liberally construed is stated in Visina v. Freeman, 252 Minn. 177, 89 N.W. (2d) 635; C. Thomas Stores Sales System, Inc. v. Spaeth, 209 Minn. 504, 297 N.W. 9.

issue in these appeals, appellant Nevada State Bank claims that Minnesota courts have no subject-matter jurisdiction. Montgomery was appointed receiver in West Virginia on June 15, 1966, but Hunt's predecessor as conservator was not appointed until June 17, 1966. The statutory point is that under West Virginia Code § 33-10-14(b)[35] North Central's assets and rights of action had vested in Montgomery, so that under Minnesota's Uniform Liquidation of Insurance Companies Act[36] no action was to be "commenced or continued" in Minnesota "unless initiated, or consented to" by West Virginia. This defendant, accordingly, initially argues that the Minnesota conservatorship proceedings were invalid and that there was no conservator to commence the present action in Minnesota.

We do not accept this argument. The present action is a different action than the initial conservatorship proceedings. The West Virginia Code, quoted in footnote 35, *supra*, clearly contemplates that receivers in other states shall have

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[35] "As domiciliary receiver, the commissioner shall be vested by operation of law with the title to all the property, contracts, and rights of action and all of the books and records of the insurer, wherever located, as of the date of entry of the order directing him to rehabilitate or liquidate a domestic insurer or to liquidate the United States branch of an alien insurer domiciled in this State and he shall have the right to recover the same and reduce the same to possession; except that ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers which are herein prescribed for ancillary receivers appointed in this State as to assets located in this State."

[36] Section 60A.04, subd. 18, provides: "When a proceeding for rehabilitation, reorganization, or liquidation is commenced in a reciprocal state against an insurer domiciled in such state and doing business in this state, title to all of the assets of such insurer, except special deposits, as hereinafter provided, then located in this state shall vest in the insurance supervisory or other administrative agency of such reciprocal state. Thereafter no action or proceeding against such insurer of such assets, except such special deposits, *shall be commenced or continued* in the courts of this state unless initiated, or consented to, by such insurance supervisory or other administrative agency of such reciprocal state." (Italics supplied.)

all necessary rights and powers with respect to assets located in such other states, so that the Minnesota conservatorship was not a nullity as to at least the assets of North Central in Minnesota. Hunt, therefore, was a legal conservator with capacity to commence the present action.

Nevada State Bank next, and more insistently, argues that West Virginia has not effectively consented to the instant action in Minnesota. There were, as previously noted, two "consents" granted by the West Virginia commissioner to the Minnesota commissioner, allowing the latter to begin legal actions. Defendant contends that the February 26, 1968, consent[37] went to the conservatorship proceedings, not to the instant suit (thus implicitly recognizing the distinction we made in the previous paragraph). It does not attack the specificity of the March 29, 1968, consent,[38] but

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[37] "I, FRANK R. MONTGOMERY, as Commissioner of Insurance of the State of West Virginia, pursuant to the laws of the State of West Virginia and the Order of the Court dated the 15th day of June, 1966, duly made and filed on said day, join and consent to the attached Complaint and the legal action therein set forth with Plaintiff Thomas C. Hunt, Commissioner of Insurance of the State of Minnesota, as Conservator and Trustee of the assets of North Central Fire and Casualty Company located within the State of Minnesota.

"Authorization is hereby expressly given for Plaintiff Thomas C. Hunt to commence, proceed with and prosecute to conclusion, *said legal action* against the defendants named in said Complaint.

* * * * *

"[signed] FRANK R. MONTGOMERY"

(Italics supplied.)

[38] "I, FRANK R. MONTGOMERY, Insurance Commissioner of West Virginia and receiver of North Central Fire & Casualty Co., hereby consent to, authorize and ratify the commencement and prosecution of the following specific litigation:

"(1) Thomas C. Hunt, Conservator and Trustee of North Central Fire & Casualty Co. vs. Nevada State Bank, et al., File No. 357743, Ramsey County District Court, State of Minnesota.

"(2) Thomas C. Hunt, Conservator and Trustee of North Central Fire & Casualty Co. vs. Don F. Roberts, et al. ($750,000), in the Circuit Court of Missouri for the 16th Judicial District.

notes that it came after the present suit was initiated. It argues that § 60A.04, subd. 18, means that the West Virginia commissioner can effectively consent only before a Minnesota action has been commenced.

We cannot agree with this reading of § 60A.04, subd. 18. The last sentence of that subdivision uses the terms "initiated, or consented to." Nevada State Bank would say that both mean actions preliminary to filing suit, initiation being, for example, when the West Virginia commissioner files the Minnesota action, and consent being when he approves Hunt's initiation, before suit is filed. Read in this way the terms are not redundant. But such a reading is inconsistent with "or continued" in the previous line. "Continued" can only be read to mean that if an action is begun without consent, as is present here if the February 26 document is invalid, it can be *continued* if there is subsequent consent, which was made on March 29.

VIII.

The Las Vegas banks, as previously stated, contend that North Central's Texas receiver is an indispensable party, the nonjoinder of which compels dismissal of these actions. The parties are agreed only upon the fact that there is a receivership in Texas, but the facts surrounding the establishment of that receivership are far from clear. Hunt asserts that it is merely an ancillary receiver, bound by the result in the Minnesota action. Although defendants have admitted an oral argument that the receiver is ancillary, they contend that this Minnesota action will have no res

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"(3) Thomas C. Hunt, Conservator and Trustee of North Central Fire & Casualty Co. vs. Don F. Roberts, et al. ($75,000 $1,250) [sic] in the Circuit Court of Missouri for the 16th Judicial District.

* * * * *

"[signed] FRANK R. MONTGOMERY"

judicata effect in the event of any subsequent action by that receiver.

Approaching the dispute in the context of a pretrial motion to dismiss made by the defendants, we must give every credit to the facts well pleaded and the collateral evidence supporting it. Plaintiff's Exhibit A, in Appeals No. 41699 and No. 41700, is a supporting document[39] by which, pursuant to Rule 20, Rules of Civil Procedure, Montgomery joined in the Minnesota action and, in addition, agreed that the entire receivership, including the Texas ancillary receiver, will be bound by the outcome of the Minnesota action.

The trial court had issued orders dated August 18, 1968, and March 26, 1969, prohibiting discovery pending disposition of these motions. Future opportunity for discovery may be expected to elucidate the nature of the Texas receiver and elicit any intention it may have not to be bound by the result of this action. If there is indeed a conservator or receiver in another state who will not be bound by the judgment in this state (either by agreement or by being made a party to the actions), it remains open to the trial court to determine whether the action should be dismissed for nonjoinder of an indispensable party.

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39 "* * * I, FRANK R. MONTGOMERY, hereby join in the above entitled action as an additional party plaintiff for the purpose of asserting and joining in the same claims for relief as have been asserted heretofore by Thomas C. Hunt; I further state in addition:

* * * * *

"3.) That some of the defendants herein have asserted the defenses of lack of the real party in interest and improper joinder and lack of joinder of parties plaintiff; that, without conceding or admitting the validity of those objections and defenses in the interests of expediting the prosecution and maintenance of this action, I join in this action as a party plaintiff and state and agree that the entire receivership, including the ancillary receivership in the State of Texas and the Conservatorship in the State of Minnesota, shall be bound by the results of this action and shall be foreclosed by any judgments rendered herein."

IX.

The last question we must answer is that raised by Murphy with respect to the order denying Murphy leave to serve all of its third- and fourth-party complaints. First National, as previously noted, had moved to serve third- and fourth-party complaints in May 1968. At that time Murphy made similar motions, but it withdrew them when First National was making its oral argument. On September 4, 1968, Judge Stewart granted First National's motions except as to Delta. (Neither First National nor Murphy had included Burke or the two Pioneer companies in their motions.)

On November 26, 1968, Murphy again filed its third- and fourth-party motions, this time naming more defendants. On January 14, 1969, the trial court granted Murphy's motions except as to Burke, the Pioneer companies, and Delta. Murphy appeals from the denial of its motions as to these defendants.

It is obvious that Murphy was inexcusably dilatory. Rule 14.01, Rules of Civil Procedure, provides in part:

> "*Within 15 days* after the service of the summons upon him, and thereafter by leave of court granted on motion upon notice to all parties to the action, a defendant as a third-party plaintiff may serve a summons and complaint, together with a copy of plaintiff's complaint, upon a person, whether or not he is a party to the action, who is or may be liable to him for all or part of the plaintiff's claim against him." (Italics supplied.)

The official note relative to the rule states that "an application made after the free period will be granted only under exceptional circumstances." 27A M.S.A. p. 396. As the case was situated when Judge Stewart made his rulings, there was no error in denying leave as to Burke and Delta. They were not parties as the matter then stood, so it would have worked hardship to make them specially defend in one

small part of a long and complicated lawsuit. We would ordinarily affirm the trial court's order without discussion. However, we think the circumstances are sufficiently extraordinary to warrant allowance of the Murphy motion. This is not to be construed, however, as condonation of Murphy's delay nor an emasculation of the discretion vested in the trial court. It is only a recognition of the unique dependency of the procedural issues raised by the motions to serve third- and fourth-party complaints upon the composition of the main action. We have held the defendants subject to suit in the main action, and it has been assumed by all that Murphy would proceed against these defendants by separate action if it could not bring them into the present action as third- and fourth-party defendants. To make these defendants argue identical defenses in two Minnesota courts, in trials based on identical facts, would create an unnecessary expense for the parties and unnecessarily burden the judicial machinery of the state. Only for these reasons do we reverse the order denying leave to make service upon Delta, the Pioneer companies, and Burke.

Affirmed in part; reversed in part.

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

District Court File No. 357743

Thomas C. Hunt, Conservator and Trustee of North Central Fire & Casualty Co., and Frank R. Montgomery, Receiver of North Central Fire & Casualty Co.,

Plaintiffs,

vs.

Nevada State Bank, a Nevada corporation, Bank of Nevada, a Nevada corporation, First National Bank of St. Paul, a United States corporation, Murphy Finance Co., a Minnesota corporation, Cyril C. Sheehan, individual, Harold L. Burke, individual, Pioneer Casualty Company, a Texas corporation, Pioneer General Agency, Inc., a Texas corporation, Don F. Roberts, individual, Julian M. Riley, individual, H. Carl Balsiger, individual, Edward M. Yearbury, individual, Financial Funding Corporation of Nevada, Inc., a Nevada corporation, Block Management Services, Inc., a Missouri corporation, Federal Investment Corporation, a Missouri corporation, Delta Insurance Company, Limited, a British Commonwealth corporation, A. E. Harris, et al., individuals and James L. Holly, individual,

Defendants.

## ORDER ON MOTIONS TO SET ASIDE SERVICE OF SUMMONS, ETC.

This matter came on to be heard before the Court on May 28, 1968, upon motions of various defendants to set aside the service of the summons upon them, and to dismiss the actions as to them. Oral arguments were had, and all parties have submitted extensive briefs.

The motions to set aside service of the summons and to dismiss on the ground of lack of jurisdiction of the particular following named defendants is hereby granted, and the service of summons and complaint upon them is hereby vacated and set aside:

Harold L. Burke
Pioneer Casualty Company
Pioneer General Agency
Don F. Roberts
Julian M. Riley
Edward M. Yearbury
Delta Insurance Company, Ltd.

II.

The motions of the following named defendants are, in all things, denied:

Nevada State Bank
Bank of Nevada
Federal Investment Corporation
Block Management Services, Inc.

Let a stay of 40 days be entered.

September 4, 1968.

/s/ ARTHUR A. STEWART
Retired District Judge
Serving Pursuant to
Sec. 484.61, M.S.

MEMORANDUM:

The motions of the named individuals who are defendants present a question of whether chapter 427, laws of 1967, (543.19 M.S.) confers jurisdiction on our courts in an action against an individual commenced after the passage of the act, but upon a cause of action which accrued prior to the passage of the act.

It is clear from the allegations of the complaint and the collateral facts which were admitted to be correct, that the cause of action here arose out of business within the state, or that the defendants committed a tort in Minnesota causing injury or damage. It is the Court's impression that the cause of action sounds in tort, being in the nature of an action in conversion.

It is conceded by everyone that our statutes provide that no law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature (645.21 M.S.). It is also settled in Minnesota that this statute prohibiting retroactive application applies to all laws, without making any distinction between laws relating to procedure and those relating to substantive rights.

Ekstrom v. Harmon, 256 Minn. 166, 98 N.W.(2d) 241. The Supreme Court has said the same thing on several other occasions.

It seems perfectly clear to the Court that there is nothing in Sec. 543.19 which in any way indicates any intention on the part of the legislature that this act should have any retroactive effect. In fact, the language used indicates the contrary. It will be noted that the statute applies only if a non-resident individual:

"(a) Owns, uses, or possesses any real or personal property situated in this state, or

(b) Transacts any business within the state, or

(c) Commits any tort in Minnesota causing injury or property damage."

It does not make any reference to transactions or torts committed prior to the passage of the act.

The language of the Supreme Court in

Beck v. Spindler, 246 Minn. 543,

particularly on page 557 is of importance as indicating the Court's understanding of similar statutes. That case involved the long-armed statute relating to corporations. The Court there held that the statute was applicable because, although the contract sued upon was entered into prior to the passage of the act, the cause of action for breach of warranty did not accrue until after the passage of the act.

Nevada State Bank; Bank of Nevada; Financial Funding Corporation of Nevada; Block Management Services, Inc., and Federal Investment Corporation have made motions to set aside and quash the service of the summons upon them. These motions all present, generally, the same principal questions.

None of them admit they committed any acts for which they can be held accountable in this action, but all do admit that they had some connection with the transactions giving rise to the plaintiffs' claimed cause of action. All of the above named defendants are foreign corporations and none are authorized to transact business in Minnesota. All of them contend that their connections with the transaction do not bring them within the provisions of Sec. 303.13 M.S.

The complaint alleges facts which clearly indicate that the foreign corporations named above, together with the Minnesota corporations named as defendants, and certain non-resi-

dent individuals, in March of 1966, at Saint Paul entered into a conspiracy, the purpose of which they succeeded in accomplishing, to lawfully acquire possession of and convert to their own use and benefit practically all of the assets of an insurance company doing business in Minnesota, the result of which was to render the insurance company insolvent, and thereby cause damage not only to the insurance company, but, more important, to the large number of policy holders, several thousands of whom were residents of Minnesota. Portions of the conspiracy consisted of contracts made in Minnesota. Of course, the defendants deny any wrongdoing on their part, but the defendants do not present, by affidavits or otherwise, any facts which would justify the Court in concluding that the factual allegations of the complaint do not present real issues of fact, and that a cause of action is stated.

The Court is satisfied that these alleged facts bring these defendants within the provisions of Sec. 303.13 M.S., unless there is merit to the claim that the alleged facts do not indicate any basis for a claim that these non-resident corporations made "a contract with a resident in Minnesota to be performed in whole or in part by either party in Minnesota" or "committed a tort in whole or in part in Minnesota against a resident of Minnesota."

If they all did, as a result of the alleged conspiracy, either of these things, they come within the provisions of the statute which provides that such facts shall be deemed equivalent to the appointment by such corporations of the Secretary of State as their attorney, upon whom process may be served "in any actions or proceedings against the foreign corporation, arising from or growing out of such contract or tort."

It is very clear that the complaint alleges facts indicating

that a contract was made with at least two residents of Minnesota (the First National Bank and Sheehan) and such allegations also clearly indicate that there was a conspiracy among all of the defendants to convert the assets of the insurance company, and that such conversion was accomplished, and that many residents of Minnesota (policy holders and creditors) were damaged thereby.

While probably the primary victim of the conspiracy was the insurance company, there were even more important secondary victims. These people are in effect represented by the plaintiff in this action, who seeks to recover primarily for the benefit of the policy holders and creditors.

The Court is not impressed with the arguments that there was no tort committed against a resident of Minnesota, and concludes that the jurisdiction of the Minnesota courts can be sustained under the provisions of the statute relating to contracts made in Minnesota and to torts committed in the state against residents of the state.

The Court has considered the various claims presented by the motions, the arguments, and briefs of counsel, and is satisfied that this Court has obtained jurisdiction.

The Court has also read the recent decision of our Supreme Court in:

Kalthoff v. Deere & Co. (decided Aug. 16, 1968).

As to defendants Pioneer Casualty Company, a Texas corporation, and Pioneer General Agency, Inc., a Texas corporation, it is sought to subject these two corporate defendants to the jurisdiction of this court under the provisions of Sec. 303.13, the so-called long-armed statute relating to corporations. The applicable portion of the statute is as follows:

> "If a foreign corporation makes a contract with a resident of Minnesota to be performed in whole or in part by either party in Minnesota, or if such foreign corpo-

> ration commits a tort in whole or in part in Minnesota against a resident of Minnesota, such acts shall be deemed to be doing business in Minnesota by the foreign corporation and shall be deemed equivalent to the appointment by the foreign corporation of the secretary of the State of Minnesota and his successors to be its true and lawful attorney upon whom may be served all lawful process in any actions or proceedings against the foreign corporation, arising from or growing out of such contract or tort."

It will be noted that this statute in effect conferred juridiction upon this court in actions "arising from or growing out of such contract or tort."

It is very clear from the allegations of the complaint and the other information before the Court that these two corporations are not claimed to have made any contract with a resident of Minnesota or to have committed any tort in whole or in part in Minnesota. Apparently, the only connection these companies had in any respect with the alleged actions which formed the basis of the plaintiff's claim is the fact that some of the alleged conspirators owned stock in these corporations and that they sold their stock. There is nothing alleged from which can be even imagined that these corporations had anything to do with the transaction in question.

Delta Insurance Company also had no connection with the transaction in question.

STEWART, J.

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## ORDER ON MOTIONS OF VARIOUS THIRD-PARTY DEFENDANTS TO SET ASIDE SERVICE OF SUMMONS AND COMPLAINT, ETC.

This matter came on for hearing before the Court upon motions of various third-party defendants to set aside the service of the summons and complaint and to dismiss the actions as to them. Oral arguments were had, and the parties presented briefs.

The motions to set aside the service of the third-party summons and complaint and to dismiss on the ground of lack of jurisdiction of the particular following named defendants is hereby granted, and the service of the third-party summons and complaint upon them is hereby vacated and set aside:

Harold L. Burke
Pioneer Casualty Company
Pioneer General Agency
Don F. Roberts
Julian M. Riley
Edward M. Yearbury
Delta Insurance Company, Ltd.

The motions of the following defendants are, in all things, denied:

Nevada State Bank
Bank of Nevada
Federal Investment Corporation
Block Management Services, Inc.

Let a stay of 40 days be entered.

ARTHUR A. STEWART
Retired District Judge
Serving Pursuant to
Sec. 484.61 M.S.

September 4, 1968.

MEMORANDUM:

In this action which arises generally out of the same transactions as are involved in the action by the Insurance Commissioner against the First National Bank, et al., the plaintiff, who, of course, stands in the shoes of the N.W. Casualty Company, seeks to recover on a fidelity bond issued to the Casualty Company by the defendant, and this bond in effect insures the Casualty Company against loss resulting from unlawful acts of its employees.

The defendant has served third-party summons and complaint upon all of the persons named as defendants in the action against the First National Bank and others as defendants. All of the third-party defendants now move to vacate or quash the service of the summons and complaint in the third-party proceeding.

The issues presented in these motions are somewhat different. The present action can be construed as nothing more than a subrogation proceeding. In such proceedings the subrogee stands in the shoes of the subrogor, and his rights against third persons are no more than the rights which the subrogor would have had. In other words, he has no cause of action, unless the North Central Casualty Company had a cause of action. It is therefore clear that any cause of action which the Fidelity and Deposit Co. may have, arose prior to the passage of the long armed statute relating to individuals.

American Mutual Liability Ins. Co. v. Reed, 265 Minn. 503, 122 N.W.(2d) 178.

It therefore follows that the motions of the individual non-resident defendants must all be granted, and the motions of the non-resident corporations denied.

STEWART, J.

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

District Court File No. 357743

Thomas C. Hunt, Conservator and Trustee of North Central Fire & Casualty Co.,

Plaintiff,

vs.

Nevada State Bank, a Nevada corporation, Bank of Nevada, a Nevada corporation, First National Bank of St. Paul, a United States corporation, Murphy Finance Co., a Minnesota corporation, Cyril C. Sheehan, individual, Harold L. Burke, individual, Pioneer Casualty Company, a Texas corporation, Pioneer General Agency, Inc., a Texas corporation, Don F. Roberts, individual, Julian M. Riley, individual, H. Carl Balsiger, individual, Edward M. Yearbury, individual, Financial Funding Corporation of Nevada, Inc., a Nevada corporation, Block Management Services, Inc., a Missouri corporation, Federal Investment Corporation, a Missouri corporation, Delta Insurance Company, Limited, a British Commonwealth corporation, A. E. Harris, et al., individuals and James L. Holly, individual,

Defendants.

## ORDER GRANTING DEFENDANT MURPHY FINANCE CO. LEAVE TO SERVE COMPLAINT, ETC.

This matter came on for hearing on motion returnable before the Court on December 6, 1968, and was thereafter argued and submitted by counsel. The motion is by Murphy Finance Co. for leave to serve Summons and fourth-party Complaint.

After hearing counsel and re-examination of the files and records, it is

ORDERED, that the defendant Murphy Finance Co. be granted leave to serve Summons and fourth-party Complaint upon Nevada State Bank, Bank of Nevada, Financial Funding Corporation of Nevada, Inc., Block Management Services, Inc., Federal Investment Corporation, Don F. Roberts, Julian M. Riley, H. Carl Balsiger and Edward M. Yearbury, and also upon North Central Underwriters, Inc.

Except as above stated, said motion is denied.

January 14, 1969.

/s/ ARTHUR A. STEWART
Retired District Judge
Serving Pursuant to
Sec. 484.61 M.S.

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MEMORANDUM:

In June and July of 1968 numerous motions attacking the jurisdiction of the Court, and also seeking leave to bring in additional parties, and to serve third and fourth-party complaints, were noticed for hearing and were argued and submitted. The Court made its order on those motions on September 4, 1968.

Among the motions which were returnable in June of 1968, was a motion by Murphy Finance Co. for leave to serve fourth-party Summons and Complaint. At the time the motions were presented to the Court, Murphy Finance Co. withdrew its motion. Thereafter, on December 6, 1968, there was brought on for hearing the present motion, which is in large part a renewal of the motion which was formerly withdrawn. A motion made so late is largely addressed to the discretion of the Court.

The Court sees no reason why Murphy Finance Co. should not be allowed to serve fourth-party Summons and Com-

plaint upon those parties named in the order granting such leave to the First National Bank. The Court does not see any objection to granting the motion as to North Central Underwriters, Inc. That corporation was not included in the previous motions which had been disposed of by the Court, and it would appear from the present motion that if the facts establish the situation described in the present motion papers there probably would be some claim for indemnification.

With respect to Delta Insurance Company, Ltd. the situation is somewhat different. Its possible connection with the case was fully argued in June and July, both on motions of Delta to set aside service of the Summons in the original action, which was granted, and also in connection with the motion of the First National Bank, which motion was denied. The only claim of any importance which the Court can find in the present motion, which was not brought to its attention in the earlier motions, is the assertion that Delta received the entire $750,000 which the State alleges was converted. If that is a fact, it would seem to follow that the defendant Murphy Finance Co. and the defendant First National Bank would have a defense to the main action, but, in the Court's opinion, the claims set up in the present motion do not present a case for indemnification.

/s/ STEWART, J.

STATE OF MINNESOTA
SUPREME COURT

---

Thomas C. Hunt, Conservator and Trustee of North Central Fire & Casualty Co., and Frank R. Montgomery, Receiver of North Central Fire & Casualty Co.,

Appellants,

vs. 41697-8

Nevada State Bank, a Nevada corporation, Bank of Nevada, a Nevada corporation, First National Bank of St. Paul, a United States corporation, Murphy Finance Co., a Minnesota corporation, Cyril C. Sheehan, individual, Harold L. Burke, individual, Pioneer Casualty Company, a Texas corporation, Pioneer General Agency, Inc., a Texas corporation, Don F. Roberts, individual, Julian M. Riley, individual, H. Carl Balsinger, individual, Edward M. Yearbury, individual, Financial Funding Corporation of Nevada, Inc., a Nevada corporation, Block Management Services, Inc., a Missouri corporation, Federal Investment Corporation, a Missouri corporation, Delta Insurance Company, Limited, a British Commonwealth corporation, A. E. Harris, et al., individuals and James L. Holly, individual,

Defendants,

Harold L. Burke, Pioneer Casualty Company and Pioneer General Agency, Inc., Don F. Roberts, Julian M. Riley, Edward M. Yearbury and Delta Insurance Company, Limited,

Respondents.

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JUDGMENT

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the Order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey be and the same hereby is in all things reversed.

And it is further determined and adjudged that appellants herein, do have and recover of respondents herein the sum and amount of Five Hundred Ninety-Nine and 75/100 Dollars ($599.75), costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed November 19, 1969.

BY THE COURT

Attest: /s/ JOHN MCCARTHY
Clerk

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## STATEMENT FOR JUDGMENT

| | |
|---|---|
| Statutory Costs | $ 25.00 |
| Printer | 544.75 |
| Clerk | 20.00 |
| Return | 10.00 |
| Total | $599.75 |

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SUPREME COURT )
) ss.
STATE OF MINNESOTA )

I, John McCarthy, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, January 21, 1970.

JOHN MCCARTHY

Clerk

By /s/ WAYNE TSCHIMPERLE

Deputy

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STATE OF MINNESOTA
SUPREME COURT

---

Thomas C. Hunt, Conservator and Trustee of North Central Fire and Casualty Company, and Frank R. Montgomery, Receiver of North Central Fire and Casualty Company,

Respondents,

vs. 41701

Fidelity and Deposit Company, defendant and third party plaintiff,

Appellant,

vs.

Nevada State Bank, third party defendant, Harold L. Burke, Pioneer Casualty Company and Pioneer General Agency, third party defendants, Don F. Roberts, Julian M. Riley, Edward M. Yearbury and Delta Insurance Company, Limited, third party defendants,

Respondents.

---

JUDGMENT

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey be and the same hereby is in all things reversed.

And it is further determined and adjudged that appellant herein, do have and recover of third party defendants-respondents herein the sum and amount of One Hundred Forty-Nine and 03/100 Dollars ($149.03), costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed November 19, 1969.

BY THE COURT

Attest: /s/ JOHN MCCARTHY
Clerk

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STATEMENT FOR JUDGMENT

| | |
|---|---|
| Statutory Costs | $ 25.00 |
| Printer | 109.03 |
| Clerk | 10.00 |
| Return | 5.00 |
| Total | $149.03 |

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SUPREME COURT )
) ss.
STATE OF MINNESOTA )

I, John McCarthy, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the

A-62

Capitol, in the City of St. Paul, January 21, 1970.

JOHN MCCARTHY

Clerk

By /s/ WAYNE TSCHIMPERLE

Deputy

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STATE OF MINNESOTA
SUPREME COURT

---

Thomas C. Hunt, Conservator and Trustee of North Central Fire & Casualty Co.,

Plaintiff,

vs. 41884

Nevada State Bank, a Nevada corporation, Bank of Nevada, a Nevada corporation, First National Bank of St. Paul, a United States corporation, Murphy Finance Co., a Minnesota corporation, Cyril C. Sheehan, individual, Harold L. Burke, individual, Pioneer Casualty Company, a Texas corporation, Pioneer General Agency, Inc., a Texas corporation, Don F. Roberts, individual, Julian M. Riley, individual, H. Carl Balsinger, individual, Edward M. Yearbury, individual, Financial Funding Corporation of Nevada, Inc., a Nevada corporation, Block Management Services, Inc., a Missouri corporation, Federal Investment Corporation, a Missouri corporation, Delta Insurance Company, Limited, a British Commonwealth corporation, A. E. Harris, et al., individuals and James L. Holly, individual,

Defendants,

Murphy Finance Co.,

Appellant,

Pioneer Casualty Company, Pioneer General Agency, Inc., and Harold L. Burke,

Respondents,

Delta Insurance Company, Limited,

Respondent.

---

Thomas C. Hunt, Conservator and Trustee of North Central Fire and Casualty Co.,

Plaintiff,

vs. 41885

Fidelity and Deposit Company of Maryland, defendant and third party plaintiff,

vs.

Nevada State Bank, et al., third party defendants, Murphy Finance Company, third party defendant,

Appellant,

vs.

Pioneer Casualty Company, Pioneer General Agency, Inc., and Harold L. Burke,

Respondents,

vs.

Delta Insurance Company, Limited,

Respondent.

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## JUDGMENT

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey be and the same hereby is in all things reversed.

Dated and Signed November 20, 1969.

BY THE COURT

Attest: /s/ JOHN McCARTHY
Clerk

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SUPREME COURT )
) ss.
STATE OF MINNESOTA )

I, John McCarthy, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, January 23, 1970.

JOHN McCARTHY
Clerk

By /s/ WAYNE TSCHIMPERLE
Deputy

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STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

File Nos. 357743 and 358246

Thomas C. Hunt, et al.,
Plaintiffs,

vs.

Nevada State Bank, et al.,
Defendants and Third-Party Plaintiffs,

and

Thomas C. Hunt, et al.,
Plaintiffs,

vs.

Fidelity & Deposit Co. of Maryland, a Maryland corporation,
Defendant and Third Party Plaintiff.

## NOTICE OF TAKING ORAL DEPOSITIONS

To: All Parties and Their Respective Attorneys, Messrs. Goff, Van Valkenburg, Robert Smith, Vessey, Green, Henson, Aretz and Hammond:

PLEASE TAKE NOTICE that the depositions, by oral examination, of the persons named in Appendix A attached, will be taken before:

*Victor Brower and Brower & Associates, notaries public at 418 First National Bank Building, Third and Carson Streets, Las Vegas, Nevada.*

at the times and on the dates specified for each person in Appendix A, and thereafter by adjournment until the same shall be completed.

Said depositions shall be used for all purposes permitted by Rule 26.04 including the use thereof in lieu of oral testimony in open court at trial if necessary.

Dated: January 14, 1970.

/s/ CLAY R. MOORE
Special Assistant Attorney General
1000 First National Bank Bldg.
Minneapolis, Minnesota 55402
333-1341
Attorney for Plaintiffs

# APPENDIX A

## SCHEDULE OF DEPOSITIONS

| | Date and Time |
|---|---|
| **A. NEVADA STATE BANK, officers and employees, Third & Carson Streets, Las Vegas, Nevada** | |
| Colvin S. Smith, Jr., Exec. Vice President | Feb. 10, 1970, 10:00 A.M. |
| H. E. Harmon, Chairman and President | Feb. 11, 1970, 10:00 A.M. |
| R. A. Carlson, Vice President | Feb. 11, 1970, 2:00 P.M. |
| R. T. Collet, Vice President, Cashier & Secretary | Feb. 12, 1970, 10:00 A.M. |
| Lucille Beverly, employee | Feb. 13, 1970, 10:00 A.M. |
| Duane C. Luttig, Auditor | Feb. 13, 1970, 2:00 P.M. |
| **B. BANK OF NEVADA, officers and employees, 225 E. Bridger, Las Vegas, Nevada** | |
| C. E. Sutherland, Exec. Vice President | Feb. 16, 1970, 10:00 A.M. |
| A. M. Smith, President (Past) | Feb. 16, 1970, 2:00 P.M. |
| C. H. Siefert, Exec. Vice President | Feb. 17, 1970, 10:00 A.M. |
| K. C. Free, Cashier-Auditor | Feb. 17, 1970, 11:00 A.M. |
| J. C. Rayborn, manager | Feb. 17, 1970, 2:00 P.M. |
| C. R. Main, manager | Feb. 17, 1970, 3:00 P.M. |
| D. R. Vlaming, Assistant Cashier | Feb. 17, 1970, 4:00 P.M. |
| A. K. Sample, Jr., Chairman and Chief Executive officer | Feb. 18, 1970, 10:00 A.M. |
| C. D. Brown, President and Trust officer | Feb. 18, 1970, 2:00 P.M. |
| **C. ESCROW SERVICES, INC.** | |
| Lois Rodman, manager | Feb. 18, 1970, 4:00 P.M. |
| Custodian of Records of Escrow Services, Inc. | Feb. 18, 1970, 4:00 P.M. |

NOTICE TO ALL PARTIES:

If any of the persons named above are no longer employed by the bank named or by Escrow Services, Inc. and cannot be made available for these depositions, then this Notice of Taking Deposition shall constitute Notice of Taking Deposition of those persons who occupy the same or similar positions with the bank or Escrow Services, Inc.

Any deposition set herein is subject to the adjournment to a later date if necessary. Also, any deposition set herein is subject to a resetting at an earlier date if circumstances permit or require.

## MOTION FOR PROTECTIVE ORDER

Harold L. Burke, Pioneer Casualty Company and Pioneer General Agency, Inc., defendant in File No. 357743, and third party defendants in File No. 385246, move the Court, pursuant to Rule 30.02 of the Minnesota Rules of Civil Procedure for an order as follows:

(1) Requiring that the depositions of those persons specified in the plaintiffs' "Notice of Taking Oral Depositions" dated January 14, 1970 in the above-entitled actions, a copy of which is attached hereto as Exhibit "A," scheduled for various times from February 10 to February 18, 1970 in Las Vegas, Nevada, be taken only on written interrogatories or only after proper written discovery procedures are exhausted; in the alternative,

(2) Requiring that the plaintiffs pay to these defendants, in advance, the expenses reasonably incurred or to be incurred by such defendants, including attorneys' fees, in attending such depositions; and/or,

(3) Entering such other or further order as the Court may deem necessary to protect these defendants from unreasonable expenses relating to discovery proceedings commenced by the plaintiffs in these actions.

The foregoing motion is based upon the attached affidavit and memorandum, upon all the files, records and proceedings herein, and upon the grounds that:

(1) The attached notice of taking depositions indicates that such depositions will be used for evidentiary purposes at the trial, as well as for discovery;

(2) Examination of the persons noticed for oral depositions can reasonably be accomplished by written interrogatories or by exhausting other written discovery procedures under Rules 33, 34 and 36, at a great savings of time and expense to all parties;

(3) The depositions noticed are greatly in excess of the number reasonably necessary to acquire whatever information is available by way of discovery, or to accomplish any legitimate objective of the plaintiffs in obtaining discovery or evidence; and

(4) The attendance of counsel for these defendants at such depositions is necessary to protect their interests, and the expenses which will be caused to these defendants thereby at a place so far removed from the forum chosen by plaintiffs herein would be unduly burdensome and oppressive to these defendants, and greatly disproportionate to their alleged involvement in the subject matter of these actions.

Dated: January 21, 1970.

O'CONNOR, GREEN, THOMAS,
WALTERS & KELLY
By /s/ KENNETH W. GREEN
Attorneys for Defendants Harold L.
Burke, Pioneer Casualty Company
and Pioneer General Agency, Inc.
845 Northwestern Bank Bldg.
Minneapolis, Minnesota 55402
336-8981

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Thomas C. Hunt, Conservator and Trustee, et al.,
Plaintiffs,

vs.

Nevada State Bank, et al.,
Defendants and Third Party Plaintiffs.

## ORDER

This matter came on for hearing before the undersigned at Special Term on January 23, 1970 upon the motion of the Defendants Burke, Pioneer Casualty Company and Pioneer General Agency, Inc. for a protective order of this Court, as more particularly set forth in said Motion and Notice of Motion. The Defendant Nevada State Bank filed a written motion joining in said matter. The Defendants Roberts, Riley, Yearbury and Balsiger also filed a written motion joining in said matter. The appearances of counsel are noted in a page attached to this Order.

This matter arises by virtue of the fact that the plaintiffs on January 16, 1970 filed a notice of the taking of certain oral depositions during the month of February in Las Vegas, Nevada. The motion of the various defendants are for a protective order regarding said oral depositions. There has been filed with this Court various Memorandums of Law by the respective counsel concerning this matter.

IT IS HEREBY ORDERED that the motion of the Defendants Burke, Pioneer Casualty Company and Pioneer General Agency, Inc., as joined in by other defendants, shall be denied in its entirety.

Dated: This 28th day of January, 1970.

/s/ J. JEROME PLUNKETT
Judge of District Court

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
SECOND JUDICIAL DISTRICT

---

Thomas C. Hunt, Conservator and Trustee of North Central Fire & Casualty Co., et al.,

Plaintiffs,

vs.

Nevada State Bank, a Nevada corporation, et al.,

Defendants.

---

Thomas C. Hunt, Conservator and Trustee of North Central Fire & Casualty Co., et al.,

Plaintiffs,

vs.

Fidelity and Deposit Company of Maryland, a Maryland corporation,

Defendant and Third Party Plaintiff,

vs.

Nevada State Bank, a Nevada corporation, et al.,

Third Party Defendants.

---

## MOTION FOR STAY OF PROCEEDINGS PENDING DISPOSITION OF APPLICATION FOR WRIT OF CERTIORARI

Harold L. Burke, Pioneer Casualty Company and Pioneer General Agency, Inc., defendants in File No. 357743, and third-party defendants in File No. 358246, move the court, pursuant to or as permitted by the provisions of 28 U.S.C.A. § 2101(f), for an order staying all further proceedings herein pending the filing and final disposition of a petition to the United States Supreme Court for a writ of certiorari to review the judgments of the Minnesota Supreme Court entered on November 19 and 20, 1969 in the above entitled actions.

In support of their motion, the movants state to the court that it is their bona fide intention to make proper and timely application to the United States Supreme Court for a writ of certiorari; that in fact a certified copy of the proceedings in the Minnesota Supreme Court has previously been requested by the undersigned counsel and forwarded to the Clerk of the Supreme Court of the United States, as more fully appears in Exhibits A and B attached hereto; that counsel for the movants anticipates that within the next week the movants' petition for a writ of certiorari itself will be delivered to the printer preparatory to final submission; that the movants believe that substantial merit exists for the questions sought to be raised in said petition as a result of the decision of the Minnesota Supreme Court; that unless such stay is granted, the movants will be irreparably injured by the extensive, costly and burdensome discovery proceedings scheduled herein, of which this Court is aware. 28 U.S.C.A. § 2101(f) reads as follows:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

Inasmuch as the record in these actions has been returned to the district court by the Minnesota Supreme Court fol-

lowing its decision, this Court has the authority to grant the stay requested herein. *Cf., Keyes v. United States Fidelity & Guaranty Co.*, 44 F. Supp. 723 (S.D. Fla. 1942); *American Infra-red Radiant Co. v. Lambert Industries, Inc.*, 41 F.R.D. 161, 164 (D. Minn. 1966); *Fidelity & Deposit Co. of Maryland v. Davis*, 127 F.2d 780 (4th Cir. 1942). And see 4A Bender's Federal Practice Forms No. 4886, pp. 734, 736, fn. 17 (1968) ("Where the mandate has gone to the District Court, the application may be granted in a proper case by that court. . . .").

Dated: January 30, 1970.

O'CONNOR, GREEN, THOMAS,
WALTERS & KELLY
By /s/ KENNETH W. GREEN
Attorneys for Defendants Harold L. Burke, Pioneer Casualty Company and Pioneer General Agency, Inc.
845 Northwestern Bank Bldg.
Minneapolis, Minnesota 55402
336-8981

STATE OF MINNESOTA
IN SUPREME COURT

---

Opinion No. 202
Nos. 41697-8, 41701, 41884-5

---

Thomas C. Hunt, et al.,

Plaintiffs-Appellants,

vs.

Nevada State Bank, a Nevada corporation, et al.,

Defendants,

Harold L. Burke, et al.,

Respondents.

---

Thomas C. Hunt, et al.,

Plaintiffs,

vs.

Fidelity and Deposit Company of Maryland,
a Maryland corporation,

Defendant and Third Party Plaintiff-Appellant,

vs.

Nevada State Bank, a Nevada corporation, et al.,

Third Party Defendants,

Harold L. Burke, et al.,

Respondents.

---

## PETITION FOR STAY OF PROCEEDINGS PENDING DISPOSITION OF APPLICATION FOR WRIT OF CERTIORARI

TO THE JUDGES OF THE SUPREME COURT:

The Respondents Harold L. Burke, Pioneer Casualty Company, and Pioneer General Agency, Inc., in the above-numbered appeals decided in Opinion No. 202 hereby petition the Court, or one of the Justices thereof, pursuant to or as permitted by the provisions of 28 U.S.C.A. §2101(f), for an order staying the enforcement of the judgment entered herein pending the filing and final disposition of a petition to the United States Supreme Court for a writ of certiorari.

In support of their request, the Respondents state to the Court that it is their bona fide intention to make proper and timely application to the United States Supreme Court for a writ of certiorari; that the respondents believe that substantial merit exists for the questions sought to be raised therein as a result of the decision of this Court; and that unless such stay is granted the Respondents will be irreparably injured in that the plaintiffs-appellants have commenced extensive discovery proceedings herein and have scheduled even more extensive, costly and burdensome discovery proceedings in the near future outside the jurisdiction of this Court, in Las Vegas, Nevada, as more fully appears from the "Notice of Taking Oral Depositions" attached hereto as Exhibit "A". The lower Court has denied protection of any nature whatsoever. See motion for protective order attached hereto as Exhibit "B" and Order denying said motion and

Order denying said motion attached hereto as Exhibits "C" and "D".

O'CONNOR, GREEN, THOMAS, WALTERS & KELLY
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Pioneer Casualty Company and
Pioneer General Agency, Inc.
845 Northwestern Bank Building
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---

## PETITION FOR MANDAMUS

To the Honorable Supreme Court of the State of Minnesota:

Your petitioner, Kenneth W. Green, directs this Court's attention to its prior opinion herein, and respectfully represents:

1. That he is one of the attorneys for Harold Burke, one of the defendants herein, who is a citizen of the State of Texas and not present in Minnesota.

2. That he is one of the attorneys for defendant, Pioneer Casualty Company and Pioneer General Agency which are Texas corporations not present in the State of Minnesota.

3. Defendants Burke and Pioneer have an interest as litigants in the defense of this action and the cost and expenses involved. Pioneer Casualty Company has an interest in the funds available to North Central Fire & Casualty in that it is a creditor in receiverships in Minnesota and Texas and their conservation. Pioneer Casualty Company is an insurance company with duties to both its stockholders and policyholders as to its own funds and expenses.

4. Plaintiff has served notice of taking deposition over a nine (9) day period from February 10 through and including February 18 in Las Vegas, Nevada. See Exhibit "A" attached hereto.

5. Petitioner has sought a protective order by motion in the Court below as to said depositions. See Exhibit "B" attached hereto. The lower Court has denied protective relief "in its entirety." See Exhibit "C" attached hereto. The lower Court has refused the exercise of any discretion in favor of the litigants.

6. Petitioner is advised that the so-called "Las Vegas Banks" have offered to have at least one knowledgeable representative apiece come to Minnesota to identify records and to testify as to events, if guaranteed immunity from process, in an effort to avoid completely or shorten the time of out-state pre-trial procedures. This has been refused by plaintiff's attorney.

7. No effort has been made to shorten or economize as to out-state pre-trial procedures by prior exhaustion of written pre-trial techniques such as interrogatories or requests for admission.

8. The expense of travel, lodging and attorneys' fees to each litigant or set thereof will be at least $3,500 exclusive of Court reporters' fees which to date have been about $150 per litigant per day. The total expense to the litigants would appear to range from $35,000 to $50,000 or more.

9. The litigants and the public have a legitimate interest in preventing the unnecessary squandering of money of themselves, their policyholders, their stockholders and the State of Minnesota on a needless or needlessly long junket to Las Vegas, Nevada.

10. The case is novel in that in its present posture a problem of first impression as to interpretation of the Rules of Civil Procedure is involved. The use of an extraordinary remedy is appropriate for lack of other adequate remedy under this Court's decision.*

11. The issue presented is unique in that the pre-trial excesses complained of arise in a case where jurisdiction is contested, has been assumed retroactively, and as against facts only assumed to be true in this Court's prior opinion. In such a case of far reaching "long arm" assumption of jurisdiction by a State Court, the State Court should and must exercise discretion for the protection of the litigants.

12. Failure to exercise any discretion under the circumstances violates the Due Process Clause of the United States Constitution. An outstate litigant under these circumstances subjected to unlimited pre-trial and discovery procedure will by very nature of the expense involved be unable to secure fair protection, fair preparation for trial and fair trial itself accordingly.

Wherefore your petitioner, who has made no other application therefor, prays that a writ of mandamus issue, commanding the District Court of Ramsey County:

a. To vacate its orders of January 28, 1970;

b. To order the exhaustion of written pre-trial procedures before oral depositions are taken in Las Vegas, Nevada;

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*Defendants Burke and Pioneer are petitioning the United States Supreme Court for writ of certiorari. On the afternoon of January 29, 1970, Chief Justice Knutson advised petitioner that he believed that this Court lacked jurisdiction to grant a stay under 28 U.S.C.A. 2101 because this Court's "mandate" had gone down to the lower Court. The lower Court advised petitioner on January 30, 1970, that it could not hear an application for such a stay at any time earlier than the afternoon of February 6, 1970. At the oral argument for a protective order on January 23, 1970, the lower Court was advised of the certiorari proceeding and of the intention to request a stay.

c. To order the payment of expenses in regard to outstate oral deposition;

d. To exercise some manner of discretion for the protection of the litigants herein;

e. In the alternative, to order postponement of the depositions in Las Vegas, Nevada, until cause has been shown at a time and place specified before this Court why the relief prayed for herein should not be granted.

/s/ KENNETH W. GREEN

My Commission Expires July 1, 1975.

Subscribed and sworn to before me a Notary Public, this 3 day of February, 1970.

/s/ JUDY RICHARDSON
Notary Public,
Hennepin County, Minn.

(Attached Exhibits "A" and "B" are omitted.)

---

## ORDER DENYING STAY

The above-captioned matter came before the Court on the Motion of Harold L. Burke, Pioneer Casualty Co. and Pioneer General Agency, Inc. for a Stay of all further proceedings pending the filing and final disposition of a Petition for Certiorari in the United States Supreme Court pursuant to 28 U.S.C.A. Sect. 2101(f).

IT IS HEREBY ORDERED that said Motion for Stay be and the same same hereby is in all things denied.

Dated: February 6, 1970.

By the Court:

/s/ J. JEROME PLUNKETT
Judge of District Court

STATE OF MINNESOTA

IN SUPREME COURT

Thomas C. Hunt, et al,
Plaintiffs,

vs. 42431

Nevada State Bank, et al,
Defendants,

Harold L. Burke, et al,
Defendants and Petitioners.

- - - - - - - - - - -

Thomas C. Hunt, et al,
Plaintiffs,

vs.

Fidelity and Deposit Company of Maryland,
Defendant and Third-Party Plaintiff,

vs.

Nevada State Bank, et al,
Third-Party Defendants,

Harold L. Burke, et al,
Third-Party Defendants and Petitioners.

O R D E R

IT IS ORDERED that the petition for a writ of mandamus on behalf of petitioners Harold Burke, Pioneer Casualty Company, and Pioneer General Agency be and hereby is denied.

Dated: February 6, 1970.

BY THE COURT

s/ Oscar R Knutson

Chief Justice

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FILED
MAR 17 1970
JOHN F. DAVIS, CLERK

In The

# Supreme Court of the United States

October Term, 1969

No. 1193

HAROLD L. BURKE, PIONEER CASUALTY COMPANY, a Texas corporation, and PIONEER GENERAL AGENCY, INC., a Texas corporation,

*Petitioners,*

vs.

THOMAS C. HUNT, Conservator and Trustee of North Central Fire & Casualty Co., SAMUEL H. WEESE, Receiver of North Central Fire & Casualty Co., FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation, and MURPHY FINANCE COMPANY, a Minnesota corporation,

*Respondents.*

## REPLY TO PETITION FOR WRIT OF CERTIORARI

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1970—Northwest Brief Printing Co., 322 S. Fourth St., Minneapolis 55415 339-5975

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In The

# Supreme Court of the United States

October Term, 1969

No. 1193

HAROLD L. BURKE, PIONEER CASUALTY COMPANY, a Texas corporation, and PIONEER GENERAL AGENCY, INC., a Texas corporation,

*Petitioners,*

vs.

THOMAS C. HUNT, Conservator and Trustee of North Central Fire & Casualty Co., SAMUEL H. WEESE, Receiver of North Central Fire & Casualty Co., FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation, and MURPHY FINANCE COMPANY, a Minnesota corporation,

*Respondents.*

## REPLY TO PETITION FOR WRIT OF CERTIORARI

### I. STATEMENT OF THE CASE

Petitioners' statement of the case is generally correct and requires only the following clarification. Murphy Finance Company's (hereinafter Murphy) motions to implead petitioners as third- and fourth-party defendants were denied by a discretionary order of the district court (App. A-56). Review of that discretionary order as a matter of right was denied by the Minnesota Supreme Court (App. A-12). Review of the trial court's discretionary order was granted by the Minnesota Supreme Court, however, as a matter of its discretion (App. A-13). The motion granting Murphy leave to implead petitioners was granted on grounds of judicial

expediency and in order to save petitioners expenses of additional litigation (App. A-45).

## II. ARGUMENT

### A. The United States Supreme Court has no jurisdiction over that portion of the decision by the Minnesota Supreme Court which grants Murphy Finance Company's motion for leave to join petitioners Burke, Pioneer Casualty Co. and Pioneer General Agency, Inc., as third- and fourth-party defendants.

It is unclear from petitioners' brief whether they seek to question the validity of that part of the judgment by the Minnesota Supreme Court which grants leave to Murphy to join petitioners as third- and fourth-party defendants. Petitioners state in note 11 (Pet. 14) they

> seek review of the constitutional questions presented by Murphy's extraterritorial impleader in conjunction with the same questions presented in the principal action and the Bonding Company's action. *For purposes of this petition, the due process arguments against all respondents are essentially the same* (emphasis added).

It appears petitioners intend to question that portion of the judgment granting Murphy's motion for leave to implead petitioners as third- and fourth-party defendants.

1. **No federal question is presented by the decision of the Minnesota Supreme Court granting Murphy's motions to implead petitioners.**

The United States Supreme Court has no jurisdiction to issue a Writ of Certiorari to a state supreme court where no federal question is specially set up in the state court action.[1]

Petitioners contend that the Minnesota Supreme Court's decision on Murphy's motions for leave to implead resolves against petitioners in advance their objections to personal jurisdiction in connection with Murphy's claims. They apparently contemplate an application of the doctrines of collateral estoppel or law of the case. According to petitioners, if the Minnesota court's judgment on petitioners' motions is not overruled, petitioners will be unable to avail themselves of the arguments on the jurisdictional issues in a suit between Murphy and petitioners.

Assuming *arguendo* this is correct, it does not mean that the questions of jurisdiction and the discretionary issue posed by Murphy's motion are dependent; on the contrary, these issues are independent. If petitioners' motion to dismiss had been granted, Murphy's motion to implead could have been granted. Murphy would not be bound by the decision in the original action since to so hold would deny Murphy the opportunity to be heard on the question whether

---

[1] 28 U.S.C. § 1257(3), under which this petition is brought provides that the Supreme Court may review judgments rendered by the highest court of a state:

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or *where any title, right, privilege or immunity is specially set up or claimed under the Constitution*, treaties or statutes of, or commission held or authority exercised under, the United States (emphasis added).

*See also Angel v. Bullington*, 330 U.S. 181 (1947); C. A. WRIGHT, FEDERAL COURTS, § 107 (1963).

Murphy had jurisdictional bases distinct from those available to those parties who had already served process against petitioners. Therefore, the judgment granting Murphy's motion for leave to implead is independent of the specific decision on jurisdiction sought to be reviewed and in no way raises constitutional questions.

The judgment of the Minnesota Supreme Court on Murphy's motions merely allowed Murphy to institute actions against the petitioners as third- and fourth-party defendants. That judgment involved the review by the Minnesota Supreme Court of a discretionary order of the district court. It involved no determination of jurisdiction in any action between Murphy and petitioners because none was then pending. The question of jurisdiction over petitioners in such an action cannot be raised until the suit is commenced and petitioners answer or otherwise plead. The judgment by the Minnesota Supreme Court merely granted leave to commence such an action. To the extent any questions of jurisdiction in connection with an action between Murphy and petitioners were considered—Murphy contends no such consideration was made—these considerations were premature.

The United States Supreme Court has recognized that, generally, where a state supreme court proceeds in the area in which state practice is controlling, no federal question is raised. *First Nat'l Bank v. Anderson*, 269 U.S. 341 (1926). *Cf. Yazoo and Mississippi Valley Ry. v. Adams*, 180 U.S. 1 (1901). As discussed above, Murphy's motions to implead petitioners were addressed to the discretion of the district court. The district court's ruling was reversed solely on discretionary grounds. A judgment on matters involving the discretionary application of a state's rules of procedure is clearly a matter in which the state's laws are controlling. Therefore, the United States Supreme Court is without jur-

isdiction to grant a Writ of Certiorari to the Supreme Court of the State of Minnesota.

**2. Even if that portion of the judgment granting Murphy's motions to implead does involve constitutional considerations, no federal question was "set up" below: Therefore, this Court has no jurisdiction to grant the petition.**

The jurisdictional statement contained in the Petition for Writ of Certiorari does not mention that portion of the judgment granting Murphy's motions nor in any way indicate that that portion of the judgment calls into question the due process clause of the Fourteenth Amendment to the United States Constitution. Petitioners' statement of the questions presented (Pet. 3) does not mention the discretionary relief granted to Murphy, nor do these questions indicate the manner in which the judgment by the Minnesota Supreme Court granting leave to Murphy to implead petitioners in any way involves a deprivation of due process. The Petition for Writ of Certiorari does not state the stage of the proceedings in the trial court at which any questions of due process related to Murphy's motion to implead were raised. The petition does not comply with any of the requirements of Rule 23(f) of the Rules of the Supreme Court of the United States insofar as petitioners intend to question that portion of the judgment related to Murphy.

The reason for this failure is apparent. At no time during the proceedings below was any federal question raised in connection with Murphy's motion to implead petitioners. The opinion of the Minnesota Supreme Court indicates that Murphy's motion was granted to save petitioners expenses of litigation and due to the "unnecessar[y] burden [on] the judicial machinery of the state." (App. A-45.) At no time was Murphy's motion considered in constitutional perspectives. Where this is the case, this Court is without jurisdiction to

grant a Writ of Certiorari, 28 U.S.C. § 1257(3). (*See* note 1, *supra*); *Herndon v. State of Georgia*, 295 U.S. 441 (1935); *Atlantic Coastline R.R. v. Mims*, 242 U.S. 532 (1917).

### 3. In a line of cases analogous to the instant situation, this Court has held that it lacked jurisdiction.

The argument that the Court has no jurisdiction over the portion of the judgment dealing with Murphy's motion is based on the premise that the judgment below involved multiple issues. Several of these issues are set forth in the Petition for Writ of Certiorari (Pet. 3). For present purposes, these questions will be referred to as "jurisdictional issues." The judgment below also involved the question whether the Minnesota Supreme Court should exercise its discretion to overrule the discretionary order of the district court denying Murphy's motions to implead petitioners. For present purposes, this question will be referred to as "Murphy's issue." As the foregoing indicates, Murphy's issue and the jurisdictional issues are independent. (*See* pp. 3-4, *supra.*) The arguments made above, Parts 1 and 2, demonstrate that no federal question exists on Murphy's issue. Arguably, a federal question does exist with respect to the jurisdictional issues. Both the jurisdictional issues and Murphy's issue were decided below. Therefore, the question raised is whether, where a Petition for Writ of Certiorari seeks review of an issue raising a federal question which issue arises from a judgment in which an issue that does not raise a federal question was also decided, does the Supreme Court have jurisdiction over the non-federal question.

In some situations, jurisdiction of the Supreme Court has been taken on all issues presented where some of the issues raised a substantial federal question sufficient to con-

fer jurisdiction while other issues did not.[2] However, these cases are not in point, and the reasons underlying the exercise of jurisdiction therein are not applicable to the present situation. No case arising under 28 U.S.C. § 1257(3) was found in which the Court, faced with two issues, one of which was sufficient to confer jurisdiction and the other being insufficient in itself, has granted a Writ of Certiorari to decide both questions.

Murphy submits that an analogy may be drawn from those cases involving what may be called the "independent state ground" rule. It is a general rule that

> where the judgment of the state court rests upon two grounds, one of which is federal and the other non-federal in character . . . jurisdiction [of the Supreme Court] fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.

*Fox Film Corp. v. Muller*, 396 U.S. 207, 210 (1935); *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487 (1965). Jurisdiction is lacking in such a case because no one ground can be said to be "necessary." An opinion by the Court on one of the grounds would be "advisory" to that extent. The Court wisely refuses to render advisory opinions. *Walters v. City of St. Louis*, 347 U.S. 231 (1954). Therefore, in such a situation, the Supreme Court will not grant a Writ of Certiorari to the state supreme court.

This reasoning is applicable to the situation in which two *independent issues* are presented one of which raises a substantial federal question while the other does not as is the case here with the jurisdictional issues and Murphy's issue.

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[2]*See, e.g., Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960), involving direct appeal under 28 U.S.C. § 1253. *Cf. Pennsylvania R.R. v. Erie Ave. Whse. Co.*, 302 F.2d 843 (3rd Cir. 1962), and related cases involving ancillary jurisdiction.

An opinion on the non-federal (Murphy's) question would be advisory to the same extent as in the foregoing situation. The Supreme Court therefore has no jurisdiction over Murphy's issue.[3]

**B. If it is determined that the Supreme Court will take jurisdiction to issue a Writ of Certiorari to the Supreme Court of Minnesota as to that portion of the court's decision granting to Murphy leave to implead petitioners, the Supreme Court should nevertheless deny the Petition for Writ of Certiorari.**

Rule 19 of the Rules of the United States Supreme Court states that certiorari will be granted only if the state court has decided a federal question of substance. Therefore, the arguments discussed above in Part A are relevant here.

Decisions such as *First Nat'l Bank v. Anderson, supra*, and *Yazoo and Mississippi Valley Ry. v. Adams, supra*, recognize that matters of procedure are peculiarly within the sphere in which state decisions should be controlling. Our federal system of courts clearly contemplates two independent judicial systems with independent practices. Other decisions by this Court, too numerous to mention, have upheld this bifurcation. A matter addressed to the discretion of a trial court, reviewed as such by the state supreme court and involving only rules of practice designed to facilitate practice and pleading is clearly a matter which should not be interfered with by the federal judiciary. Certainly, no question involving a matter such as this raises questions of sufficient substance and importance to warrant an exercise of this Court's discretion to grant a Writ of Certiorari.

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[3]The doctrine first announced in *Enterprise Irrigation Dist. v. Canal Co.*, 243 U.S. 157 (1917), to the effect that jurisdiction attaches where the non-federal ground is so interwoven with the federal ground as not to be an independent matter is not applicable to a situation such as this where the issues are clearly independent. (See pp. 3-4, *supra*).

## III. CONCLUSION

Respondent Murphy prays if certiorari to the Supreme Court of Minnesota is granted, review should be limited to jurisdictional issues. No review should be made of that portion of the decision below which grants Murphy's motions to implead petitioners.

Respectfully submitted,

DORSEY, MARQUART, WINDHORST,
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FILED
MAR 20 1970
JOHN F. DAVIS, CLERK

In The

# Supreme Court of the United States

October Term, 1969

No. 1193

HAROLD L. BURKE, PIONEER CASUALTY COMPANY, a Texas corporation, and PIONEER GENERAL AGENCY, INC., a Texas corporation,

*Petitioners,*

vs.

THOMAS C. HUNT, Conservator and Trustee of North Central Fire & Casualty Co., SAMUEL H. WEESE, Receiver of North Central Fire & Casualty Co., FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation, and MURPHY FINANCE COMPANY, a Minnesota corporation,

*Respondents.*

## REPLY TO PETITION FOR WRIT OF CERTIORARI

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1970—Northwest Brief Printing Co., 322 S. Fourth St., Minneapolis 55415 338-5078

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In The

# Supreme Court of the United States

October Term, 1969

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No.....

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HAROLD L. BURKE, PIONEER CASUALTY COMPANY, a Texas corporation, and PIONEER GENERAL AGENCY, INC., a Texas corporation,

*Petitioners,*

vs.

THOMAS C. HUNT, Conservator and Trustee of North Central Fire & Casualty Co., SAMUEL H. WEESE, Receiver of North Central Fire & Casualty Co., FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation, and MURPHY FINANCE COMPANY, a Minnesota corporation,

*Respondents.*

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## REPLY TO PETITION FOR WRIT OF CERTIORARI

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### 1. OPINION BELOW

The opinion of the Supreme Court of Minnesota which is sought to be reviewed here is reported in — Minn. —, 172 N.W.2d 292, sub. nom. *Thos. C. Hunt, Conservator and Trustee of North Central Fire & Casualty Co., et al., v. Nevada State Bank, et al.*

The petition erroneously names Frank Montgomery as one of the plaintiffs-respondents. Montgomery was originally one of the plaintiffs but Samuel Weese, the present insurance commissioner of West Virginia, has been substituted for Montgomery. (See Order of Judge Arthur Stewart, Ramsey County District Court, October, 1969.)

## 2. STATEMENT OF THE CASE

The petitioner's Statement of the Case (Pet. pp. 6-8) is, in its general outline, correct, but some additional comments and corrections are necessary.

The petition states that the complaint in this action "in substance alleged that all of the defendants participated in a conspiracy to strip North Central of $750,000.00 of its assets * * *." This statement is only partly accurate; the complaint is not limited to a conspiracy charge. The complaint states several other claims for relief in addition to conspiracy. The defendants, in the main action, are each charged jointly and severally with causing or contributing to:

(1) The fraudulent transfer, in at least two instances, of $750,000.00 of North Central's assets.

(2) The unlawful premature payment of $750,000.00 of Certificates of Deposit owned by North Central contrary to Federal Reserve regulations and the terms of the Certificates.

(3) Breaches of various of the defendants' fiduciary responsibilities to North Central and its policyholders.

(4) The fraudulent conversion and misappropriation of $750,000.00 of North Central's assets.

(See Minnesota Court opinion, 172 N.W.2d at 298, and Complaint.)

The claims against Fidelity & Deposit Co. of Maryland in the $100,000.00 action on North Central's employees' fidelity bond rest, for the most part, on the same causes of action asserted in the main action.

Petitioners Burke, Pioneer General Agency, Inc., and Pioneer Casualty Co. are included with all other defendants in the claims for relief in the complaint. It is significant to note

that the Minnesota Court stated in a footnote to its decision (172 N.W.2d at 300, footnote 13):

> "Rule 103.03(i), Rules of Civil Appellate Procedure. Even considered on the merits under our powers of discretionary review, however, and taking the plaintiff's allegations as true, *a viable cause of action is clearly stated.*" (Emphasis added.)

In addition to the main allegations of the complaint the respondents-plaintiffs served upon petitioners' counsel on May 31, 1968, Amendment "Y" to the complaint which is reprinted in full with the affidavit of service in the appendix hereto (A. 1). This Amendment contains several allegations specifically related to petitioners Burke and the Pioneers.

Petitioners are apparently under the impression that Amendment "Y" was not effective. In this they are mistaken. At the time Amendment "Y" was served—May 28, 1968—the complaint had been served but these petitioners had not yet served or filed an answer to the complaint. Under *Minnesota Rules of Civil Procedure*, Rule 15.01, it is provided in pertinent part:

> "15.01 Amendments. A party may amend his pleading once as a matter of course and any time before a responsive pleading is served * * *."

This rule of Minnesota is identical in all respects to Rule 15(a), *Federal Rules of Civil Procedure*. On May 28, 1968, the petitioners had done nothing more than serve a motion to dismiss. Petitioners' answer was not served actually until December 26, 1969, about seven months later, following the Minnesota Supreme Court's decision on the jurisdictional questions. (See Record.) Amendment "Y" is therefore an effective amendment as to these petitioners.

## 3. PROCEEDINGS IN THE TRIAL COURT

The petitioners' motions to dismiss were supported by three affidavits of petitioner Burke, individually, and as president of Pioneer General Agency and Pioneer Casualty Co. (see petitioners' brief below, A. 1-5, A. 8-10, A. 12-14). These affidavits were, in the main, broad conclusionary affidavits couched in statutory language designed merely to create an issue rather than to reveal. Respondents-plaintiffs countered with voluminous affidavits which are contained in the original record before the Court. (See affidavits of Hunt, I, II, III, IV and V with attached exhibits.) As is customary, no oral testimony was taken, the matter being submitted wholly on affidavits and the pleadings.

Hearings before the trial court were held on May 28, 1968. The trial judge rendered his orders granting petitioners' motions on September 4, 1968 in both the main action and the bonding company case (see Petition, Appendix 46-54). These orders were reversed by the Supreme Court of Minnesota in the decision of which review is sought by petitioners.

The proceedings in the trial court were procedurally in accord with standard practice under the Minnesota rules. The petitioners did not request the opportunity to present oral testimony or documentary evidence other than by affidavits, although that option was available to them.

## 4. PROCEEDINGS FOLLOWING THE MINNESOTA SUPREME COURT'S JUDGMENTS OF NOVEMBER 19-20, 1969

Following the Minnesota Court's decision, the respondents-plaintiffs began the process of pre-trial discovery. Several depositions of Minnesota residents were taken in January, 1970. In addition, notices of depositions for several witnesses in Las Vegas, Nevada were served. These depositions began February 10, 1970 (see Petition, Appendix 65-66). Petitioners sought protective orders on various grounds be-

fore the trial court which were denied by the trial court's order of January 29, 1970 (see Petition, A. 67-69). Petitioners then sought a writ of mandamus from the Minnesota Supreme Court on February 3, 1970 seeking to halt the scheduled Las Vegas depositions. This effort was denied by the Minnesota Supreme Court by order dated February 6, 1970 (see attachment to petition). On February 6, 1970 petitioners applied to the Minnesota Court for a stay of all proceedings in this action until its application for a writ of certiorari was decided by this Court. This applicaton was similarly denied by the Minnesota District Court (see Petition, A. 78).

We do not know why the petitioners have included these references to the recent discovery proceedings in the Minnesota Courts. The petition itself clearly limits the matters for review on page 1 wherein it is stated:

> "This is a petition by Harold L. Burke, Pioneer Casualty Company and Pioneer General Agency, Inc., for a writ of certiorari to review judgments of the Supreme Court of the State of Minnesota entered in the above actions *on November 19 and 20, 1969.*" (Emphasis added.)

No review is sought of the Minnesota Court's denial of a writ of mandamus on February 6, 1970 or the denial of a stay on the same date.

Furthermore, the Las Vegas depositions have been completed, having consumed eight days from February 11th to February 20, 1970. Any issue regarding those depositions is moot.

## REPLY TO PETITIONERS' ARGUMENTS

The petitioners have presented four questions. None of these questions present a federal question of substance. Nor have the petitioners demonstrated that the Minnesota Supreme Court decided any federal question not in accord with applicable decisions of this Court, within the meaning of Rule 19, *Rev. Rules, Supreme Court of the United States.*

### Question No. 1
(Petition pp. 3 and 18-20)

In Question No. 1 the petitioners assert that the Minnesota Court accepted the allegations of plaintiffs' complaint as "conclusive against jurisdictional motions supported by affidavits," and that due process was thereby denied.

The petitioners are in error as to what the Minnesota Court did. The Minnesota Court did indeed state that, for the purpose of a motion under Minnesota Rule 12.02, the allegations of the complaint must be taken as true. Opinion below, 172 N.W.2d at 296. However, the Minnesota Court also clearly stated at 172 N.W.2d at 297:

> "We therefore rely on the plaintiffs' complaint *and the evidence adduced at the hearings* upon the various motions for a statement of the facts." (Emphasis added.)

At 172 N.W.2d 308-309, the Minnesota Court observed specifically with respect to these petitioners:

> "With respect to the ground upon which the trial court dismissed the actions against the Pioneer companies, we reach a different conclusion. The available facts are based *upon documentary evidence rather than any resolution of testimonial conflict, as to which we would be required to defer to the trial court.* We think the allegations of the complaint *and the collateral evidence*, taken as true, sufficiently establish a factual issue as to the role of the Pioneer companies, as corporate entities, in the alleged conspiracy." (Emphasis added.)

The Minnesota Court further stated at 172 N.W.2d 309:

> "*Other documentary evidence* would raise an inference that the role of the Pioneer companies was not merely passive, but active, involvement in a crucial early stage of the alleged scheme." (Emphasis added.)

And similarly as to petitioner Burke:

> "As an aid to understanding what Burke allegedly stood to gain by these complicated financial dealings, it is appropriate to recite some of the details of *the purchase agreement* between Sheehan and Burke as sellers and Financial Funding as buyers dated March 24, 1966 and signed by Yearbury for Financial Funding." (Emphasis added.)

It is therefore obvious that the Minnesota Court relied upon the various affidavits and attached documents in making its findings as to the jurisdictional contacts of these petitioners. These affidavits and attached documents are contained in voluminous affidavits filed by respondent-plaintiff Hunt in opposition to the various motions to dismiss for lack of jurisdiction (Hunt affidavits I, II, III, IV and V).

The petitioners have no valid complaint about the procedure adopted, which is common in both the Minnesota and Federal Courts. Both parties consented to the hearing of petitioners' motion to dismiss on affidavits and the petitioners cannot now complain. *Bowman v. Curt G. Joa, Inc.* (C.A. 4th, 1966), 361 F.2d 706, 716-717.

The petitioners do not deny that the various affidavits of the plaintiffs support the Minnesota Supreme Court's findings. The argument rather seems to be that the petitioners' affidavits were ignored, which hardly raises a federal question.

We point out, in addition, that the respondents-plaintiffs, unlike ordinary litigants, played no part in the complex financial transactions involved in these cases. The plaintiffs are public officials of the State of Minnesota and West Vir-

ginia with statutory duties as receiver and conservator of the assets of North Central. Plaintiffs' knowledge of the facts is obviously not first-hand knowledge; only the petitioners have that kind of knowledge.

The very nature of the transactions involved, which are alleged to constitute a fraud and a conspiracy to defraud, make it imperative that the plaintiffs not be put to impossible burdens of proof at the initial stage of these proceedings before the plaintiffs have had an opportunity for the searching inquiries available under the discovery rules. The facts and information available to the plaintiffs and presented to the Minnesota Court were more than sufficient to establish that the petitioners were engaged in relevant activity which was directly concerned with the State of Minnesota and which occurred in the State of Minnesota. The full story, however, is known only to these petitioners. The respondents-plaintiffs are not required to prove their right to recovery in order to establish jurisdiction over the petitioners at this stage of the case.

It has been held in *United States v. Montreal Trust Company* (C.A. 2nd 1966), 358 F.2d 239, 242, cert. denied 86 S.Ct. 1366, 384 U.S. 919, 16 L.Ed.2d 440, in passing upon a jurisdictional motion under Rule 12:

> "At this early stage of the proceedings, the government [plaintiff] should not have been required to submit proof which would, in effect, establish the validity of its claim and its right to the relief sought. Rather, to bring such §302 into operation, and thereby invoke the jurisdiction of the District Court, the government was required to establish only prima facie tax-related transactions of Klein in New York."

With respect to the procedure adopted by the Minnesota Courts, we should note that the respondents-plaintiffs have suggested both to the trial court and to the Minnesota Supreme Court that, in view of the complexity of the case, the

Court might have invoked *Minnesota Rules of Civil Procedure*, Rule 12.04 (identical to Federal Rule 12(d)), providing that the Court defer the hearing and determination of the jurisdictional questions until the trial on the merits. The petitioners vigorously objected to such a procedure in the trial court.* The Minnesota Supreme Court did not, however, order the determination deferred until trial but instead decided the issue on the basis of the evidence before it, a procedure which the petitioners themselves desired.

## Question No. 2
### (Petition pp. 3 and 21-24)

In Question No. 2 the petitioners claim that the Minnesota long-arm statutes involved, in particular *Minn. Stat.* §543.19, is more restrictive in its scope than the limits of due process and that the Minnesota Court should not have construed §543.19 as a statutory effort to exert the state's maximum power under the due process clause. This question was not presented in the Minnesota Court.

This argument, moreover, is merely a contention that the Minnesota Court misconstrued a Minnesota statute. Such a contention does not raise a federal question. This Court has held that the highest Court of a state is the final arbiter in the construction of a state statute. *Frost v. Railroad Commission of State of California* (1926), 46 S.Ct. 605, 271 U.S. 583, 70 L.Ed. 1101; *Supreme Lodge, etc. v. Meyer* (1924), 44 S.Ct. 432, 265 U.S. 30, 68 L.Ed. 885. See also 28 *U.S.C.A.* §1257, note 94, and cases cited therein.

The petitioners do not contend that the Minnesota long-arm statutes involved, *as construed*, violate any constitutional provision.

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*Such a procedure is specifically approved in complex cases in Wright and Miller, *Federal Practice and Procedure* §1351, Vol. 5, page 566.

Furthermore, and without extended discussion, it is obvious that the facts relied upon by the Minnesota Court in finding jurisdiction over these petitioners fall well within the statutory language in the Minnesota long-arm statutes involved, *Minn. Stat.* §543.19 and §303.13, Subd. 1(3).

## Question No. 3

In Question No. 3, the petitioners apparently contend that the Minnesota Court erroneously decided that jurisdiction over these petitions could be sustained on the basis of a "tortious conspiracy outside the state causing injury within the state."

It is difficult to determine precisely what is meant in this contention.

The contention itself is based upon the erroneous conclusion that the complaint states a cause of action only for conspiracy whereas, as we pointed out previously, the complaint states several causes of action only one of which is conspiracy.

It further appears that the activities of the Pioneers and Burke in connection with the fraudulent scheme had a more than adequate connection with the State of Minnesota. The Minnesota Supreme Court found, 172 N.W.2d at 309, that petitioner Burke (president of the Pioneer corporations) and defendant Sheehan on March 21, 1966 directed a bank in San Antonio to send certain stocks to the First National Bank of St. Paul, and thence to the Nevada State Bank in Las Vegas, said letter being directly involved in the totality of these complex financial transactions. Petitioner Burke also executed a purchase agreement dated March 24, 1966 which is also signed by defendants Sheehan and Yearbury on the same day. On March 24, 1966 defendants Sheehan and Yearbury were physically in St. Paul on the premises of the First National Bank of St. Paul. On its face, this document

indicates that Burke must also have been present in St. Paul, or, at least, he permitted someone to act on his behalf. In any event, the fatal transactions that occurred in St. Paul, Minnesota on March 24, 1966 resulted in enriching petitioner Burke by $24,000.00 in cash plus an interest in a surplus debenture note. It is impossible to separate the petitioners from the transactions in St. Paul on March 24, 1966. These petitioners participated in bringing about those transactions and played a vital role therein.

In addition, and as a part of the underlying strata giving rise to this action, petitioner Pioneer Casualty Co. owned about 13,000 shares of stock in North Central until November, 1965. This stock was apparently overvalued by Pioneer and the Texas Department of Insurance had claimed that Pioneer was impaired by reason thereof. Defendant Sheehan thereupon, in November of 1965, borrowed $250,000 from defendants First National Bank of St. Paul and Murphy (a finance company located in St. Paul, Minnesota) to buy North Central's stock from Pioneer and thus relieve the situation. It was this loan, among others, which Sheehan and the First National Bank of St. Paul and Murphy sought to pay off by the fraudulent transaction occurring later on March 24, 1966. Defendant Murphy, in turn, had a real interest in loaning $200,000 to Sheehan for this purpose because Murphy had premium financing contracts with Pioneer and Murphy was concerned about the continued solvency of Pioneer. Under the premium financing agreements, Murphy, in St. Paul, was Pioneer's attorney-in-fact (see Hunt Affidavit (I) and exhibits thereto). Pioneer's physical connection with Minnesota had become well established, therefore, long prior to March 24, 1966.

It is apparently conceded by petitioners that the damage resulting from those transactions fell primarily within the State of Minnesota. North Central's policyholders were pri-

marily Minnesota residents. This is not a case in which the activities of parties in other states have unkowingly and unwittingly and indirectly caused remote damage in another state. If the petitioners are found to be liable under any claim for relief, such a finding would necessarily imply that the petitioners knew that their acts would cause damage primarily in Minnesota.

At any rate, the question presented involves no federal question of substance and is not contrary to any of this Court's opinions (Petition pp. 3 and 24-25).

### Question No. 4
### (Petition pp. 3 and 26-27)

We cannot understand the petitioners' presentation in Question No. 4. Apparently petitioners are objecting to discovery proceedings which have already taken place in Las Vegas, Nevada. This question is moot.

If the petitioners are seeking a stay of all proceedings, we comment only that this action was commenced in March of 1968 and the jurisdictional objections asserted by the petitioners and other defendants were not fully resolved until October of 1969, almost 18 months later.

Only in January of 1970 have the respondents-plaintiffs had the opportunity to begin the ordinary process of preparing for trial through discovery techniques. The respondents-plaintiffs are attempting to manage a receivership of an insurance company which was collapsed by the activities of these same petitioners among others. The delays that have already occurred in this lawsuit have been substantial and the Minnesota Court was quite correct in refusing to countenance any more delaying tactics from these petitioners. The receivership of North Central and the claimants against this receivership have a right to a speedy determination of this case. The connection of the petitioners Burke and Pioneers

with the allegedly fraudulent transactions is abundantly clear already. The depositions that were recently concluded in Las Vegas, Nevada have made those connections even more certain. The Minnesota Court has acted properly in speeding the prosecution of this case.

We do not understand that the petitioners are raising a federal question as to the "retroactive" application of the Minnesota long-arm statute §543.19. If that question should somehow be involved, however, we cite this Court's decision in *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L.Ed.2d 223, 78 S.Ct. 199, in which this Court specifically held that a retroactive application of a long-arm statute involved no vested rights and was not violative of the due process clause. 355 U.S. at 224.

## CONCLUSION AND SUMMARY

The petitioners have not presented, as a question for decision, the bare issue of whether the jurisdictional contacts by the petitioner were adequate to satisfy the requirements of due process. Some comment is in order.

The jurisdictional contact in *McGee v. International Ins. Co.*, supra, consisted merely of mailings in connection with one insurance policy. The insurance company involved had no other contacts whatever. This Court held that the contact was sufficient.

It is obvious, under the facts presented to the Minnesota Supreme Court, and not contested by these petitioners, that the contacts in this case were far more substantial than those in the *McGee* case. No real question could be raised about the constitutional adequacy of those contacts, and we surmise that that is the reason why the petitioners have engaged in such a markedly strained effort to concoct "federal questions" out of routine issues involving standard trial practice and the interpretation of state statutes.

Given the expanding concepts of in personam jurisdiction alluded to in *McGee,* supra, the Minnesota Court was completely correct in its decision.

We pray that the petition be denied.

Respectfully submitted,

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# APPENDIX

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

THOMAS C. HUNT, Conservator and Trustee of North Central Fire & Casualty Co.,

Plaintiff,

vs.

NEVADA STATE BANK, a Nevada corporation, ET AL.,

Defendants.

## AMENDMENT TO COMPLAINT

Plaintiff hereby amends his Complaint by adding the following as paragraph "Y" thereof:

Y.

Plaintiff furfher alleges as to defendants Pioneer General Agency, Inc. and Pioneer Casualty Company that said defendants participated in, and in part caused to happen, the transactions occurring on and about March 24, 1966 in the State of Minnesota and the transactions occurring in the State of Nevada, by, among other things, bringing about negotiations between the "Roberts Group" and defendant Cyril Sheehan for the sale by Sheehan of his interests in North Central Fire & Casualty Co. and of his interests in Pioneer General Agency, Inc. and Pioneer Casualty Company; that, upon information and belief, said Pioneer General Agency, Inc. and Pioneer Casualty Co. deposited certain sums of money with the Las Vegas Banks for the purposes of encouraging and facilitating said banks to loan money to the "Roberts Group" for the purchase of North Central Fire & Casualty Co., and Pioneer General Agency, Inc. and Pioneer

Casualty Company; and, that said Pioneer General Agency, Inc. and Pioneer Casualty Company, through their president, Harold Burke, conspired with the "Roberts Group," defendant Sheehan and others for the purpose of bringing about a fraudulent transfer, conversion and misappropriation of North Central Fire & Casualty Co. assets.

29 May 1968.

DOUGLAS M. HEAD
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By /s/ CLAY R. MOORE
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the State of Minnesota

---

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA )
) ss.
COUNTY OF HENNEPIN )

Lynn A. Beneke of the City of Minneapolis, County of Hennepin, in the State of Minnesota, being duly sworn, says that on the 31st day of May, 1968, she served the annexed Amendment to Complaint on Mr. Kenneth Green, the attorney for Pioneer Casualty Co., Pioneer General Agency, Inc. and Harold L. Burke, the defendants in this action, by mailing to him a copy thereof, inclosed in an envelope, postage prepaid, and by depositing same in the post office at Minneapolis, Minnesota directed to said attorney at Northwestern Bank Bldg.,

Minneapolis, Minn., the last known address of said attorney.

/s/ LYNN A. BENEKE

Subscribed and sworn to before me
this 31st day of May, 1968.

ORPHA O. WILLETT
Notary Public,
Hennepin County, Minn.
My Commission Expires Sept. 10, 1973.

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MAR 25 1970
JOHN F. DAVIS, CLERK

In The

# Supreme Court of the United States

October Term, 1969

No. 1113

HAROLD L. BURKE, PIONEER CASUALTY COMPANY, a Texas corporation, and PIONEER GENERAL AGENCY, INC., a Texas corporation,

*Petitioners,*

vs.

THOMAS C. HUNT, Conservator and Trustee of North Central Fire & Casualty Co., SAMUEL H. WEESE, Receiver of North Central Fire & Casualty Co., FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation, and MURPHY FINANCE COMPANY, a Minnesota corporation,

*Respondents.*

## REPLY TO PETITION FOR WRIT OF CERTIORARI

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In The

# Supreme Court of the United States

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No.....

HAROLD L. BURKE, PIONEER CASUALTY COMPANY, a Texas corporation, and PIONEER GENERAL AGENCY, INC., a Texas corporation,

*Petitioners,*

vs.

THOMAS C. HUNT, Conservator and Trustee of North Central Fire & Casualty Co., SAMUEL H. WEESE, Receiver of North Central Fire & Casualty Co., FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation, and MURPHY FINANCE COMPANY, a Minnesota corporation,

*Respondents.*

## REPLY TO PETITION FOR WRIT OF CERTIORARI

### I. STATEMENT OF THE CASE

The petitioners' Statement of the Case is, in general terms, correct, and only additional comments are required. Fidelity and Deposit Company of Maryland (hereinafter Fidelity) was served in a companion case with an action by the same plaintiffs seeking recovery on an employee fidelity bond, with the same general allegations as those made in the principal action. Fidelity, in turn, commenced third-party actions against the defendants of the main action, seeking recovery in the event it should be held liable on the bond (Minnesota Court decision, 172 N.W.2d at 298 and at 299, footnote 3).

In the District Court proceedings and in the appellate proceedings in the Minnesota Supreme Court, Fidelity presented and argued independent bases for finding jurisdiction over the nonresident individuals (the petitioner, Harold L. Burke and others) and the foreign corporate defendants (Pioneer Casualty, Pioneer General and Delta).

## II. ARGUMENT: REPLY TO PETITIONERS' ARGUMENTS FOR ALLOWANCE OF THE WRIT

### A. The Minnesota Supreme Court and the Minnesota District Court Had Before Them Sufficient Allegations of Fact to Sustain Personal Jurisdiction Consistent with the Constitutional Requirements of the Cases of the United States Supreme Court.

#### 1. The Test That the Minnesota Supreme Court Applied to the Rule 12 Motion to Dismiss for Lack of Jurisdiction Encompassed Sufficient Allegations of Material Fact and Was Consistent with the Discretionary Authority Which Is Given the Trial Court.

Petitioners attempt to raise a Constitutional issue of lack of due process in the manner by which the Minnesota Supreme Court and the Minnesota District Court reviewed the allegations of the Complaint, together with the supplementary exhibits, amendments and attachments. The decision of the Minnesota Supreme Court in its careful consideration of the facts and in its outline of the numerous contacts or alleged contacts of Harold Burke, individually, and of the Pioneer companies as controlled by the defendant, Harold Burke, amply refutes the petitioners' arguments. Particular reference is made to the decision of the Minnesota Court, 172 N.W.2d at page 308 and following at which section the connection of Burke and the Pioneer companies with the schemes are discussed at length.

Petitioners cite the case of *Taylor v. Portland Paramount Corporation*, 383 F.2d 635 (9th Cir. 1967), as authority for a due process requirement placed upon the trial court. Neither that case nor the other case and reference material cited by the petitioners (Pet. 19 and 20) are authority for the imposition of any more rigid due process standard than was in fact imposed in this case. The three requirements of the *Taylor* case, *supra*, at 641, are met here. Those requirements are:

> "The first requirement is that the nonresident defendant must do some act or consummate some transaction within the forum. Personal presence, however, is not required. Thus, for example, use of the mails may suffice. (Citing the case of McGee v. International Life Ins. Co., 355 U.S. 220, 2 L.Ed.2d 223, 78 S.Ct. 199.) The second requirement is that the claim must arise out of or result from the defendant's activities within the forum. The third requirement, which assumes the first two are met, is that the assumption of jurisdiction must be consonant with the due process tenants of fair play and substantial justice."

The generally accepted approach, consistent with the above requirements, is that the trial court must be given substantial discretion to resolve jurisdictional questions raised by Rule 12 motions to the trial court. In this regard, see *Moore's Fed. Practice*, Vol. 2a, Sec. 12.07, and the cases cited at footnote 7, page 2259.

## 2. The Application of the Minnesota Long-Arm Statute Is Consistent with the Due Process Requirements of the United States Supreme Court and Does Not Present an Issue for Constitutional Determination.

By their arguments B, C and D petitioners seek to sustain their claims that the Minnesota Supreme Court ignored due process requirements in applying and construing the Minnesota Long-Arm Statute.

After quoting only a portion of the applicable Minnesota Long-Arm Statute (Pet. 22), petitioners then proceed to the argument that "The Minnesota Supreme Court itself stated that the petitioners are alleged to have conspired outside the state, resulting in injury within the state—thereby eliminating subparagraph (c) from consideration by its very terms (Pet. 22)."

This argument, forming the basis of petitioners' attack, entirely ignores the precise language of the Minnesota Court. At 172 N.W.2d 301, footnote 16, the entire text of *Minn. St.* 543.19—the Minnesota Long-Arm Statute—is set forth, and it ends with the following comment of the Court:

> *"(It has been assumed throughout the proceedings that if this statute is available, it will be applied through subd. 1(c).)"* (Emphasis added.)

Since the decision is in fact premised upon a contact under Subd. 1(c) of the *Minnesota Statute*, the only question unresolved concerns the due process requirements as applied on the facts available. Considering the due process requirements of the *Taylor* case, *supra*, the allegations were found by the Minnesota Court to have involved an act by a nonresident defendant within the forum state and as indicated, the Minnesota Court was proceeding on this basis. Secondly, it would appear that petitioners do not seriously assert that the claim herein involved does not arise out of those activities of the defendant within the forum. The remaining require-

ment then after the first two requirements have been met is that the assumption of jurisdiction must be consonant with the due process demands of fair play and substantial justice.

Two of the cases cited by petitioners serve as comparisons in applying the third due process requirement. The Minnesota Federal District Court case of *Flemmen v. Midland Overseas Shipping Corporation*, 254 F. Supp. 592 (1966), is cited as representing an instance in which the due process requirements were properly applied (Pet. 23). A review of the facts of that case will show that it arose under the language of *Minnesota Statute* 303.13, Subd. 1(3), which provides a means of substituted service on the Minnesota Secretary of State for foreign corporations. By its uncontroverted affidavit, the defendant in that case was shown to be not licensed to do business in Minnesota nor, in fact, doing any business in Minnesota. Further, that the defendant did not maintain any office or place of business in the state and had made no contract pertinent to the litigation with any resident of Minnesota. The defendant, a ship owner, had nothing to do with the stevedoring which did involve plaintiff who was a stevedore involved on a job. Also, that the plaintiff in the case was not a resident of Minnesota but a Wisconsin resident and had no connection with the Minnesota forum. Finally, the defendant showed that there was no contractual performance of any type in Minnesota and that no tort had been committed in whole or in part in Minnesota.

The facts then were substantially distinguishable from those which were before the Minnesota Supreme Court in the instant case. After determining that there was no basis for jurisdiction in the Minnesota Court, Judge Donovan added the following comments:

> "The writer leans toward applying the substituted service statute where the facts and evidence support that conclusion. In the words of Mr. Justice Black, the trend

> is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and nonresidents. (Citing McGee.) [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have such minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (Citing also *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, at page 594.)

The other case relied upon by the petitioners is *Beaty v. M. S. Steel Company*, 401 F.2d 157 (4th Cir. 1968). That case is also distinguishable since it involved interpretation of the Maryland Long-Arm Statute, Art. 75, Sec. 96(a)(4), *Maryland Code Annotated Supp.* (1965). That provision is set forth at page 159 of the *Beaty* decision and it is discussed as "more restrictive" than the Uniform Interstate and International Procedure Act provision (p. 159). The Maryland Act is also not as broad as the Illinois Long-Arm Statute and such is acknowledged by the Court. Quite the contrary arises in the case of the Minnesota Statute since it was tailored after the Illinois Act, and the Minnesota Supreme Court, at some length, considers the Illinois Statute and the Illinois cases construing it; see in particular pages 305 and 306 of 172 N.W.2d.

Petitioners' argument does not present an issue of due process nor does it show a failure on the part of the Minnesota Court to apply due process requirements. The case itself, in particular the discussion at 172 N.W.2d 311, indicates that the Minnesota Supreme Court was fully aware of and was proceeding within the Constitutional limits applied to the exercise of jurisdiction.

**B. The Supreme Court Should Deny the Petition for Writ of Certiorari Because Other Grounds for Finding Jurisdiction, Consistent with Due Process Requirements, Were Before the Minnesota Supreme Court.**

After the Minnesota Supreme Court determined that there was jurisdiction under the Minnesota Long-Arm Statute in the first instance, it was unnecessary for that Court to consider the secondary levels at which jurisdiction could have determined. In Fidelity's situation, it was unnecessary to determine the issue:

> "We hold, therefore, that section 543.19 is retroactive in its application. The effect of this holding is to validate service upon the individual defendants. It also validates service on Delta under Minn. St. 543.19. *It is unnecessary to decide when Fidelity's cause of action arose, itself a vigorously disputed point of law;* treating it for present purposes as arising at the same time as Hunt's, Fidelity's service under section 543.19 is sufficient to subject the defendants to suit in its third-party action." (172 N.W.2d at 307, emphasis added.)

As a consequence, petitioners first recourse should have been to seek a re-hearing by the Minnesota Court. Without having that procedure exhausted, the Supreme Court is called upon to determine, on Constitutional grounds, a statute which could have been sustained by the Minnesota Court at other levels by the arguments made by other litigants on the appeal. Fidelity was one of the other litigants whose arguments were not reached by the Minnesota Court.

## III. CONCLUSION

Respondent Fidelity prays that the petition be denied.

Respectfully submitted,

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